

ORIGINAL

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Hon. Edward W. Miller, Circuit Court Judge

Case No. 2013-002435
Trial Court Case No. 2011-CP-23-07943

John Deere Financial, f.s.b., f/k/a FPC Financial, f.s.b.

Plaintiff,

vs.

Jerry A. Bruce,

Defendant

and

Jerry A. Bruce,

Third Party Plaintiff

Of Whom Jerry A. Bruce

Respondent

vs.

Flint Equipment Co.

Appellant.

RECORD ON APPEAL

RECEIVED

NOV 19 2014

SC Court of Appeals

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Attorney for Respondent

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SUMMONS FOR RELIEF (Complaint Served)

Craig H. Allen, P.A., Attorney at Law
605 Pettigru Street
Greenville, SC 29601

STATE OF SOUTH CAROLINA)

COUNTY OF GREENVILLE)

IN THE COURT OF COMMON PLEAS

John Deere Financial, f.s.b.,
f/k/a FPC Financial, f.s.b.,

Plaintiff,

vs.

Jerry A. Bruce,

Defendant(s).

ENTERED COMPUTER

SUMMONS

2011-CP-23-

79813

FILED-CLERK OF COURT
GREENVILLE, S.C.
NOV 29 2011

2011 NOV 29 P 12:15

TO THE DEFENDANT(S) ABOVE NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, of which a copy is herewith served upon you, and to serve a copy of your Answer to the said Complaint on the subscribers at their offices, 605 Pettigru Street, Greenville, South Carolina 29601, within thirty (30) days after the service hereof, exclusive of the day of such service. If you fail to answer the Complaint within that time, judgment by default will be rendered against you for the relief demanded in the Complaint.

CRAIG H. ALLEN, P.A.

BY:

Craig H. Allen, S.C. Bar #000329
Attorneys for Plaintiff
605 Pettigru Street
Greenville, SC 29601
864-239-0444

Greenville, SC

Dated: November 28, 2011

STATE OF SOUTH CAROLINA,

COUNTY OF GREENVILLE

John Deere Financial, f.s.b.,
f/k/a FPC Financial, f.s.b.,

Plaintiff,

vs.

Jerry A. Bruce,

Defendants.

IN THE COURT OF COMMON PLEAS

COMPLAINT
Non-Jury
2011-CP-23

FILED
CLERK OF COURT
GREENVILLE, S.C.
JAN 10 2012

2011 NOV 29 P 12:15

The Plaintiff abovenamed, complaining of the Defendant herein, would respectfully show the Court:

I.

That Plaintiff is a federal savings bank.

II.

That upon information and belief, Defendant is a resident of the County of Greenville, State of South Carolina, and has heretofore engaged in business in said County and State.

III.

That on or about June 7, 2010 Defendant applied for business credit with Plaintiff, and executed and delivered to Plaintiff his credit application, a copy of which is attached hereto as Exhibit A and incorporated herein by reference; that as is set forth in Exhibit A, Defendant represented himself to be the sole proprietor of the business, and agreed to the terms and provisions of the Power Plan Credit Agreement, attached hereto as a part of Exhibit A and incorporated herein by reference; that as further set forth in Exhibit A, Defendant agreed to pay

CH
#5

interest on any delinquent balance at the variable rates set forth in Exhibit A; that Exhibit A further provides that said Defendant would pay reasonable attorneys' fees and costs incurred by Plaintiff in enforcing the account terms.

IV.

That acting and relying on the credit application, Exhibit A hereto, and at the special instance and request of Defendant, and upon his promise and agreement to pay Plaintiff for the same, Plaintiff sold and delivered goods to Defendant; that the aforesaid goods were sold and delivered by Plaintiff to Defendant at the time or times, in the character and amounts, and at the agreed prices as set forth in the itemized statement of account, a copy of which is attached hereto as Exhibit B and incorporated herein by reference; that after applying all payments and credits to the account as stated thereon, there remains due and owing Plaintiff by Defendant on the aforesaid account, the sum of Six Thousand Four Hundred Seventy Six and 90/100 (\$6,476.90) Dollars; that Plaintiff has made demand on Defendant for payment of the balance due Plaintiff, however Defendant has failed and refused to pay the same; that accordingly, Plaintiff is entitled to recover from said Defendant the aforesaid indebtedness, together with reasonable attorney's fees, pursuant to the terms and provisions of Exhibit A.

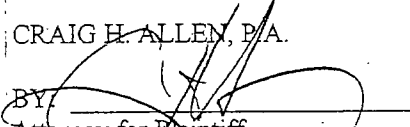
V.

That as set forth in Exhibit A, Plaintiff is entitled to recover from Defendant reasonable attorney's fees for this action; that Plaintiff is informed and believes that not less than 20% of the balance due would be a reasonable attorney's fee in this action.

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JD

WHEREFORE, Plaintiff prays for judgment against Defendant, Jerry A. Bruce, in the sum of Six Thousand Four Hundred Seventy Six and 90/100 (\$6,476.90) Dollars, plus reasonable attorney's fees of 20% of said total balance due, for the costs of this action, and for such other and further relief as to the Court may seem just and proper.

CRAIG H. ALLEN, P.A.

BY: 

Attorney for Plaintiff

Craig H. Allen, S.C. Bar #000329

P.O. Box 10854

Greenville, SC 29603

864-239-0444

Greenville, SC

November 28, 2011

9.3

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

John Deere Financial, f.s.b.,
W/a FPC Financial, f.s.b.,

Plaintiff,

vs.

Jerry A. Bruce,

Defendant.

FILED-CLERK OF COURT IN THE COURT OF COMMON PLEAS
GREENVILLE CO. S. C. THIRTEENTH JUDICIAL CIRCUIT
PAUL B. WICKENSIMER

2012 DEC -7 P 1:31

2011-CP-23-7943

Motion

ENTERED COMPUTER

To: John Deere Financial, f.s.b., Plaintiff, by and through its attorney, Craig H. Allen,
Esquire

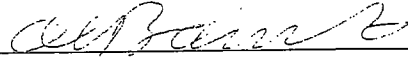
The Defendant, Jerry Bruce, will move the Court within ten (10) days after service of this Motion, or at such other time as the matter may be heard, for an Order allowing him to name as a Third-Party Defendant, Flint Equipment Company, a corporation headquartered in Simpsonville, South Carolina. Grounds for the said Motion are as follows:

1. The Plaintiff's suit is to collect for repairs placed on the credit card of the Plaintiff by Flint Equipment Co.
2. The repairs, which were charged to the credit card of the Defendant, Jerry Bruce, were performed by Flint Equipment Company of Simpsonville, South Carolina.
3. The Defendant, Jerry Bruce, denies he authorized the repairs, or that the repairs were made at his request or were necessary.
4. That Flint Equipment Company is a necessary party in order to adjudicate the defenses regarding the charges on the John Deere credit card.

Wherefore, the Defendant, Jerry Bruce, moves, pursuant to Rule 14(a), *SCRCP*, for an Order allowing the Defendant, Jerry Bruce, to file a third-party Complaint against Flint Equipment Company in order to resolve all of the issues raised under the current facts, and such other and further relief as the Court may deem just and proper.

Scanned

BANNISTER & WYATT, LLC



O. W. Bannister

SC Bar No. 506; Fed. ID No. 1184

401 Pettigru Street (29601)

P. O. Box 10007 (29603)

Greenville, South Carolina

Phone: (864) 298-0084; Fax: (864) 298-0146

Attorney for Defendant

December 6, 2012

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

John Deere Financial, f.s.b.,
f/k/a FPC Financial, f.s.b.,

Plaintiff,

vs.

Jerry A. Bruce,

Defendant.

IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT

FILED-CLERK OF COURT
GREENVILLE CO S.C.
PAUL R. WICKENS

2011-CP-23-7943

ENTERED COMPUTER

Answer

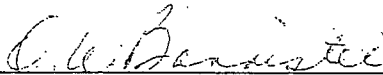
(Jury Trial Demanded)

The Defendant, Jerry A. Bruce, answering the Complaint of the Plaintiff, would respectfully show to the Court as follows:

1. All allegations not admitted are denied.
2. Upon information and belief, paragraphs 1, 2, and 3 are admitted.
3. Paragraphs 4 and 5 are denied.

Wherefore, having fully answered the Complaint of the Plaintiff, the Defendant demands judgment and costs as provided by law.

BANNISTER & WYATT, LLC



O. W. Bannister

SC Bar No. 506; Fed. ID No. 1184

401 Pettigru Street (29601)

P. O. Box 10007 (29603)

Greenville, South Carolina

Phone: (864) 298-0084; Fax: (864) 298-0146

Attorney for Plaintiff

SCANNED

December 13, 2011

Jury Trial is demanded under Rule 38

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

John Deere Financial, f.s.b.,
f/k/a FPC Financial, f.s.b.,

Plaintiff,

vs.

Jerry A. Bruce,

Defendant,

AND

Jerry A. Bruce,

Third-Party Plaintiff,

vs.

Flint Equipment Co.,

Third-Party Defendant.

To: The Defendant(s) Above Named:

IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT

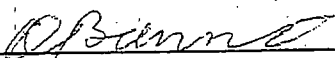
2011-CP-23-7943

2013 FEB - 8 PM 2: 36
FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENSINGER

Summons

You are hereby summoned and required to answer the Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your answer to the Complaint upon the subscriber at 401 Pettigru Street, Greenville, SC 29603, within thirty (30) days after the service hereof, exclusive of the day of such service. If you fail to answer the Complaint within that time, a judgment by default will be rendered against you for the relief demanded in the Complaint.

BANNISTER & WYATT, LLC


G. W. Bannister
SC Bar No. 506; Fed. ID No: 1184
401 Pettigru Street (29601)
P. O. Box 10007 (29603)
Greenville, South Carolina
Phone: (864) 298-0084; Fax: (864) 298-0146
Attorney for Defendant and Third-Party Plaintiff

February 6, 2013

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

John Deere Financial, f.s.b.,
f/k/a FPC Financial, f.s.b.,

Plaintiff,

vs.

Jerry A. Bruce,

Defendant,

AND

Jerry A. Bruce,

Third-Party Plaintiff,

vs.

Flint Equipment Co.,

Third-Party Defendant.

IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT

2011-CP-23-7943

Complaint of Third-Party Plaintiff
Against Third-Party Defendant

FILED - CLERK OF COURT
GREENVILLE CO S C,
PAUL B. WICKENSINGER
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Jerry A. Bruce (hereinafter "Bruce"), the Defendant and Third-Party Plaintiff, alleges:

1. The allegations of John Deere Financial, f.s.b., f/k/a FPC Financial, f.s.b., Plaintiff, are realleged as though set out in full.
2. The Answer of the Defendant, Jerry A. Bruce, to John Deere Financial (hereinafter "John Deere") is incorporated as though set out in full.
3. The Third-Party Defendant, Flint Equipment Co., (hereinafter "Flint"), is a corporation organized under the laws of Georgia and conducts business in Simpsonville, South Carolina. Flint sells John Deere equipment and repairs the same.
4. On a previous occasion Bruce had taken a track hoe which he had purchased from Flint to Flint's location for repairs. Disputes arose as to a condition of the track hoe when

delivered to Bruce. As a result of these disputes, Bruce recovered amounts sufficient to replace the defective equipment on his track hoe.

5. Later, on or about June 16, 2010, Bruce delivered his track hoe to Flint in Simpsonville for a required or recommended 4,000 hour service.

6. On or about August 23, 2010, Bruce paid Flint \$2,000.00 by check for the 4,000 hour service.

7. On or about November, 2010, Bruce paid an additional \$850.00 for parts and labor.

8. At no time did Bruce authorize Flint or anyone else to charge his account to John Deere for any charges done between June, 2010, and present.

9. Flint made unauthorized charges on the John Deere credit card of Bruce. Because Bruce was not required to sign for the work done or the charges, Bruce was charged by John Deere with the unauthorized work.

10. Upon information and belief Flint equipment has discharged the manager and the mechanic who allegedly did the unauthorized work on Bruce's track hoe. Upon information and belief, others have had the experience of unauthorized charges in the same like and manner as Bruce.

For A First Cause Of Action Against Flint

(Fraud and Deceit)

11. Prior allegations are realleged.

12. Flint made representations to John Deere that it had authorization from Bruce to make charges on Bruce's credit card with John Deere.

13. These representations were false. The representations made by Flint were material because Bruce was charged for work he neither authorized and, upon information and belief, nor was done.

14. Flint was aware at the time they made the representations that they were false, or were made in reckless disregard of their truth or falsity.

15. Flint intended for John Deere to rely upon the representations and, upon information and belief, obtain money from John Deere which was then charged to Bruce by John Deere.

16. Flint ignored the falsity of the representations that were made to John Deere.

17. That John Deere relied upon the truthfulness of the representations made to them by Flint and charged the account of Bruce.

18. The Defendant Bruce was ignorant of the representations made to John Deere for the charges placed upon his charge account by Flint until he was billed for the same.

19. Bruce had a right to rely on Flint not making false charges against his credit with John Deere.

20. As a direct and proximate result of the false and material representations made to John Deere against Bruce's credit with John Deere, the Defendant Bruce has been damaged actually, specially, incidentally, and consequentially and is entitled to actual and punitive damages.

For A Second Cause Of Action

(Unfair Trade Practices)

21. Prior allegations are realleged.

22. Flint is a person within the meaning of *S. C. Code Ann.*, §39-5-10(a).

23. The Defendant Flint has performed unfair or deceptive acts or practices in the conduct of commerce within the meaning of *S. C. Code Ann.*, §39-5-20, including, but not limited to:

- a) Charging Bruce's credit with John Deere for work that was neither authorized nor performed;
- b) Obtaining payment from John Deere which was charged to Bruce.

24. The unfair and deceptive acts and practices engaged in by Flint have an impact upon public interest and that they demonstrate a continuing series of steps in furtherance of fraudulent schemes with a potential for repetition including, without limitation, past and continuing charging of work not authorized or done to public members who have John Deere credit cards or credit by making materially false and misleading statements.

25. The unfair and deceptive actions of Flint practiced upon Bruce have been and continue to be willful.

26. The unfair and deceptive actions by the Third-Party Defendant Flint are immoral, unethical, and oppressive.

27. The unfair and deceptive acts engaged in by the Third-Party Defendant Flint were done on its own behalf and to its own benefit.

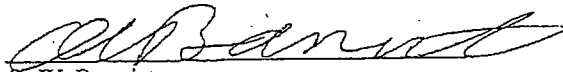
28. As a direct and proximate result of the unfair and deceptive acts and practices engaged in by the Third-Party Defendant Flint, the Third-Party Bruce has been damaged in actual and consequentially and is entitled to those damages and punitive damages.

Wherefore, the Third-Party Plaintiff Bruce prays for judgment against Flint for:

- 1) Actual, special, incidental, and consequential damages in an amount to be specified at trial.
- 2) An award of prejudgment interest.

- 3) An award of three (3) times the damage sustained to the unfair trade practices of Flint.
- 4) For reasonable attorney fees and costs.
- 5) For such other and further relief as the Court may deem just, relative to the Third-Party Defendant's unfair trade practices.
- 6) For the cost of this action.
- 7) For such other relief as the Court may deem just and proper.

BANNISTER & WYATT, LLC



O. W. Bannister
SC Bar No. 506; Fed. ID No. 1184
401 Pettigru Street (29601)
P. O. Box 10007 (29603)
Greenville, South Carolina
Phone: (864) 298-0084; Fax: (864) 298-0146
Attorney for Defendant and Third-Party Plaintiff

February 6, 2013

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

John Deere Financial, f.s.b.,
f/k/a FPC Financial, f.s.b.,

Plaintiff,

vs.

Jerry A. Bruce,
Defendant,

AND

Jerry A. Bruce,
Third-Party Plaintiff,

vs.

Flint Equipment Co.,

Third-Party Defendant.

2013 FEB 1

IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENS JUDGE

2011-CP-23-7943

AFFIDAVIT OF SERVICE BY MAIL

The undersigned certifies that a true copy of the foregoing:

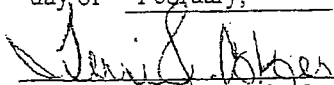
1. Summons
2. Complaint of Third-Party Plaintiff Against Third-Party Defendant

was this day mailed, postage prepaid, to:

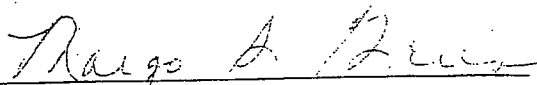
C T Corporation System
2 Office Park Court, Ste. 103
Columbia, SC 29223

Craig H. Allen
605 Pettigru Street
Greenville, SC 29601

SWORN TO before me this 8th
day of February, 20 13.


NOTARY PUBLIC for South Carolina
My Commission Expires: 3-9-18

BANNISTER & WYATT, LLC


Margo S. Green
P. O. Box 10007, Greenville, SC 29603
P (864) 298-0084; F (864) 298-0146

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2011CP2307943

John Deere Financial Fsb

Fpc Financial Fsb

Jerry A Bruce

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for: ☐ Plaintiff ☒ Defendant
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRCF; ☐ Rule 41(a), SCRCF (Vol. Nonsuit);
☐ Rule 43(k), SCRCF (Settled); ☐ Other: _____
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j) SCRCF; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED:

☐ See attached order; (formal order to follow)

☒ Statement of Judgment by the Court:

This matter is before the Court on Defendant's motion to add a party. Defendant denies authorizing services performed by Flint Equipment Company that were charged to his John Deere credit card. This Court finds that Flint Equipment Company is a necessary party to this suit. As such, Defendant is granted permission to file a third-party complaint against Flint Equipment Company.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

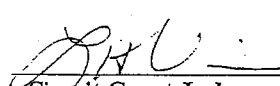
Additional Information for the Clerk:

ENTERED COMPUTE

INFORMATION FOR THE JUDGMENT ENTRY		
Complete this section below when the judgment is entered in favor of personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.		
Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.


2162
2/12/13
 Circuit Court Judge Judge Code Date

For Clerk of Court Office Use Only

This judgment was entered on 2/15/13, and a copy mailed first class or placed in the appropriate attorney's box on 2/15/13, to attorneys of record or to parties (when appearing pro se) as follows:

Craig Horger Allen Craig H. Allen, P.A. P.O. Box 10854
Greenville, SC 29603

ATTORNEY(S) FOR THE PLAINTIFF(S)

Oscar W. Bannister Bannister & Wyatt, LLC P.O. Box
10007 Greenville, SC 29603

ATTORNEY(S) FOR THE DEFENDANT(S)

Paul B. Wickensimer Greenville County Clerk Of
Court - Clerk of Court

Court Reporter



STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

John Deere Financial, f.s.b., f/k/a
FPC Financial, f.s.b.,

Plaintiff,

vs.

Jerry A. Bruce,

Defendant,

AND

Jerry A. Bruce,

Third-Party Plaintiff,

vs.

Flint Equipment Co.,

Third-Party Defendant.

IN THE COURT OF COMMON PLEAS

THIRTEENTH JUDICIAL CIRCUIT

CASE NUMBER: 2011-CP-23-7943

**AFFIDAVIT OF DEFAULT FOR
THIRD-PARTY DEFENDANT
FLINT EQUIPMENT CO.**

FILED
13 APR 17
WLS

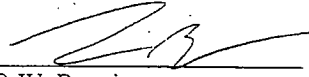
Luke A. Burke, being duly sworn, deposes and states:

1. That he is attorney and counsel of record for the Defendant, Jerry A. Bruce, in the above-entitled action.
2. That the Summons and Complaint in this action was duly served upon the Third-Party Defendant Flint Equipment, Co. on February 8, 2013, as appears from the Affidavit of Service made and filed herein.
3. That no answer, demurrer, motion, or notice of appearance has been filed with the Clerk or served on or received by the Defendant's attorney in this action. The time

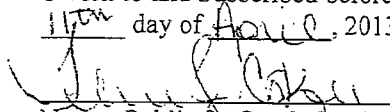
SCANNED

for answering has expired without any appearance of Third-Party Defendant, by pleading or otherwise.

4. That this Affidavit is made in support of Defendant's Motion for entry of Third-Party Defendant's default, filed herewith.


O.W. Bannister
S.C. Bar # 506
Luke A. Burke
S.C. Bar # 100033
401 Pettigru Street
Greenville, SC 29601
Telephone: (864) 298-0084
Fax: (864) 298-0146
ATTORNEYS FOR DEFENDANT
JERRY A. BRUCE

Sworn to and Subscribed before me
17th day of April, 2013


Notary Public for South Carolina
My Commission expires: 3-9-18

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT

John Deere Financial

CASE NO. 2011-CP-23-7943
PAUL B. WICKENSHER

MOTION AND ORDER INFORMATION
FORM AND COVERSHEET

vs.

Jerry A. Bruce

Defendant.

Jerry A. Bruce
Fleet Equipment Co.

3rd Party Plaintiff's

Plaintiff's Attorney:

Bar No.

Address:

Phone: Fax

E-mail: Other:

Defendant's Attorney: J.W. Bannister

Bar No. 00506

Address: 401 Pettigrew St. Greenville, SC

Phone: 864-0011 Fax

E-mail: Other:

- ☐ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)
☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)
☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

SECTION I: Hearing Information

Nature of Motion:

Estimated Time Needed:

Court Reporter Needed: ☐ YES/☐ NO

SECTION II: Motion/Order Type

☐ Written motion attached

☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☒ Plaintiff/☒ Defendant

5-21-2013
Date submitted

SECTION III: Motion Fee

☐ PAID - AMOUNT: \$

☐ EXEMPT:

(check reason)

- ☐ Rule to Show Cause in Child or Spousal Support
☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRPC)
☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter: _____
☐ Other: _____

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached order.

☐ Other:

JUDGE CODE _____

Date: _____

CLERK'S VERIFICATION

Collected by: *[Signature]*

Date Filed: _____

☒ MOTION FEE COLLECTED: \$ 25.00

☐ CONTESTED - AMOUNT DUE: \$ _____

1879 Bannister & Wyatt

FILED IN THE COURT OF COMMON PLEAS
STATE OF SOUTH CAROLINA GREENVILLE COUNTY IN THE COURT OF COMMON PLEAS
PAUL B WICKENSHER THIRTEENTH JUDICIAL CIRCUIT
COUNTY OF GREENVILLE 2013 MAY 30 P 3:33

John Deere Financial, f.s.b.,
f/k/a FPC Financial, f.s.b.,

C.A. No.: 2011-CP-23-7943

Plaintiff,

vs.

Jerry A. Bruce,

Defendant,

AND

Jerry A. Bruce,

Third-Party Plaintiff,

vs.

Flint Equipment Co.,

Third-Party Defendant.

**ORDER OF DEFAULT AND
ORDER SETTING DAMAGES
HEARING**

This matter is before the Court upon Motion of counsel for the Third Party Plaintiff seeking an Entry of Default and requesting that a hearing be set to determine appropriate damages, attorneys fees and costs.

It appearing to the Court that this third party action was commenced by the Third Party Plaintiff filing a Summons and Complaint of Third Party Plaintiff against the Third Party Defendant on February 8, 2013. It further appearing that Third Party Defendant Flint Equipment Company was duly served through its registered agent, C.T. Corporation System on February 8, 2013, via certified mail, return receipt requested, as evidenced by the Affidavit of Service filed with this Court on February 11, 2013.

ENTERED COMPUTER

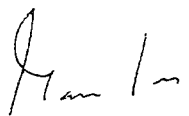
SCANNED

Copy mailed to
Attorney <u>Bannister</u>
on <u>5</u> <u>30</u> <u>13</u>

It further appearing that the Third Party Defendant has failed to file an Answer, respond, or otherwise plead to the Third Party Complaint as is evidenced by the Affidavit of Default filed with this Court on April 12, 2013.

Based on the foregoing, it is hereby ordered that the Third Party Defendant is in default on the Third Party Plaintiff's Complaint. The Clerk of Court shall immediately set a hearing to determine damages, such hearing to be held on _____, the _____ day of _____, 2013, at _____ o'clock ____m. in the Court of Common Pleas of the County of Greenville, South Carolina.

IT IS SO ORDERED.



Judge, Thirteenth Judicial Circuit

Greenville, South Carolina

Date: 5.28.13

I SO MOVE:



O. W. Bannister (SC Bar No. 00506)
Attorney for Third Party Plaintiff

6/17/2013

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
JAN B. WICKENS
STATE OF SOUTH CAROLINA THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE JUN 17 A 9 26

John Deere Financials, f.s.b.

Civil Action No.: 2011-CP-23-7943

Plaintiff,

vs.

Jerry A. Bruce,

Defendant

NOTICE OF MOTION AND
MOTIONS TO SET ASIDE DEFAULT
ENTRY OR DEFAULT JUDGMENT
AND FOR LEAVE TO FILE ANSWER

AND

Jerry A. Bruce,

Third-Party Plaintiff,

vs.

Flint Equipment Co.,

Third-Party Defendant.

TO: O.W. Bannister, Attorney for the Defendant and Third-Party Plaintiff, Jerry A. Bruce.

YOU WILL TAKE NOTICE that the Defendant Flint Equipment Co., ("Flint") will move the Court, no sooner than ten (10) days hence, or as soon thereafter as counsel may be heard, seeking an Order setting aside an entry of default together with the default judgment if entered, and for leave to file an answer in the above referenced matter, pursuant to Rules 55(c), 60(b)(1) and 60(b)(4) of the South Carolina Rules of Civil Procedure. A copy of the proposed Answer is attached herein as Exhibit A.

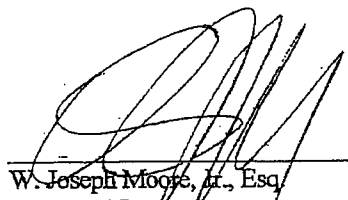
This motion is supported by Flint's Memorandum of Law and the Affidavit of Tony Sammons, Chief Executive Officer and Secretary of Flint, attached herein as Exhibit B, which

establish the following grounds for setting aside the entry of default or default judgment, if entered, under S.C.R.C.P. 50(c) and 60(b)(1):

1. The default resulted from mistake and excusable neglect arising from the misplacement and mis-delivery of the pleadings with the result that the appropriate officers within Flint did not receive the pleadings until June 5, 2013 or thereabouts, the date of receipt of the notice of damages hearing. If not filed, the entry of judgment should be set aside for "good cause," based on the same set of facts, as the attached Memorandum of Law will demonstrate.
2. Flint has meritorious defense to the Plaintiff's allegations of fraud and violation of South Carolina Unfair Trade Practices Act in that Flint actually performed the repair services at issue and no authorization from Plaintiff was required before invoice for such repairs were submitted to John Deere Financials, f.s.b.
3. Flint files this motion within one week of first receiving notice of default entry.
4. No prejudice to Plaintiff will result if default entry or default judgment, if filed, is set aside.

Additionally, Flint will move to dismiss pursuant to S.C.R.C.P. 60(b)(4) on the grounds that the judgment, if entered, is void. Because the Plaintiff failed to obtain leave of the court prior to filing and serving its Third-Party Complaint, the court did not have personal jurisdiction over Flint when the Complaint was served.

As required by Rule 11 of the South Carolina Rules of Civil Procedure, the undersigned counsel has consulted with counsel for the Plaintiff prior to filing this motion in an attempt to resolve this matter and counsel for the Plaintiff has indicated that he cannot consent to the entry of an order allowing the Defendant to file an answer in this matter.



W. Joseph Moore, Jr., Esq.
Phong T. Nguyen
GERTZ & MOORE, LLP
1416 Laurel St.
P.O. Box 456
Columbia, SC 29201
(803) 252-1524, #2

June 13, 2013
Columbia, SC

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

John Deere Financial, f.s.b., f/k/a FPC Financial,
f.s.b.,

Plaintiff,

vs.

Jerry A. Bruce,

Defendant

and

Jerry A. Bruce,

Third-Party Plaintiff,

vs.

Flint Equipment Co.,

Third Party Defendant

IN THE COURT OF COMMON PLEAS

Civil Action No.: 2011-CP-23-7943

**ANSWER OF THIRD PARTY
DEFENDANT FLINT EQUIPMENT
COMPANY TO THIRD PARTY
COMPLAINT**

The Third Party Defendant Flint Equipment Co., (herein after "Flint") by and through its undersigned attorney, responding to the Third Party Complaint herein moves the Court for an order requiring the would respectfully show unto the Court as follows:

1. Each and every allegation of the Third Party Complaint not hereinafter specifically admitted, explained or qualified is denied and strict proof demanded thereof.

2. In responding to the allegations contained in paragraph 1 of the Third Party Complaint, Flint would show unto the court that it was not a party to and was not served with the complaint filed by John Deere Financial, f.s.b., f/k/a FPC Financial, f.s.b in this matter nor was a copy of the complaint attached to or served on Flint with the Third Party complaint. Accordingly, Flint has no notice or information concerning the allegations referenced in paragraph 1 of the Third Party Complaint and therefore is unable to respond to same. Flint reserves the right to respond to



each of the individual allegations contained in the referenced pleading upon receipt of a copy of the Plaintiff's complaint in this matter.

3. In responding to the allegations contained in paragraph 2 of the Third Party Complaint, the Flint would show unto the court that it was not served with the answer made by the Defendant\Third Party Plaintiff to John Deere Financial, f.s.b., f/k/a FPC Financial, f.s.b in this matter nor was a copy of the answer attached to or served on Flint with the Third Party Complaint. Accordingly, Flint has no notice or information concerning the of the allegations referenced in paragraph 2 of the Third Party Complaint and therefore is unable to respond to same. Flint reserves the right to respond to each of the individual allegations contained in the referenced pleading upon receipt of a copy of the answer of the Defendant\Third Party Plaintiff in this matter.

4. The allegations contained in paragraph 3 of the Third Party Complaint are admitted.

5. The allegations of paragraph 4 of the Third Party Complaint are denied and strict proof demanded thereof.

6. In response to the allegations of paragraph 5 of the Third Party Complaint, Flint would show unto the court that the Defendant\Third Party Plaintiff brought the equipment into Flint's shop in Simpsonville on May 28, 2010 complaining of an intermittent problem with jerky hydraulics and boom operation and requesting the repair of same. While the equipment was in the possession of Flint for the foregoing repairs the Defendant\Third Party Plaintiff also requested that Flint perform a 4000 hour service (scheduled maintenance) on the equipment. The allegations of paragraph 5 of the Third Party Complaint are denied to the extent that said allegations are inconsistent with the foregoing.

7. In response to the allegations contained in paragraphs 6, 7 and 8 of the Third Party Complaint, Flint would show unto the court as follows:

- a. On June 7, 2010, the Defendant\Third Party Plaintiff made application to John Deere Financial, f.s.b. for a PowerPlan line of credit to be used to pay for the repairs and service being performed by Flint to Defendant\Third Party Plaintiff's equipment.

- b. The Defendant\Third Party Plaintiff's application was approved by John Deere Financial, f.s.b. which established a \$10,000 PowerPlan line of credit for the Defendant\Third Party Plaintiff.
- c. The repairs and service performed by Flint on the Defendant\Third Party Plaintiff's equipment were charged to and paid with the line of credit pursuant to the terms of the application and the terms of the PowerPlan account applied for by the Defendant\Third Party Plaintiff.
- d. The Defendant\Third Party Plaintiff did not make the payments set forth in paragraphs 6 and 7 of the Third Party Complaint to Flint. Rather Flint is informed and believes that any payments made by the Defendant\Third Party Plaintiff were made to the Plaintiff John Deere Financial, f.s.b. as payments on and pursuant to the terms of the Defendant\Third Party Plaintiff's PowerPlan account.

To the extent the allegations contained in paragraphs 6, 7 and 8 of the Third Party Complaint are denied and strict proof is demanded thereof to the extent said allegations are inconsistent with the foregoing,

8. The allegations of paragraph 9 and 10 of the Third Party Complaint are denied and strict proof is demanded thereof.

9. In response to paragraph 11 of the Third Party Complaint, which realleges and incorporates the allegations contained in the preceding paragraphs of the Third Party Complaint, Flint realleges its responses to each incorporated paragraph as if repeated herein verbatim.

10. Flint denies the allegations of paragraphs 12, 13, 14, 15, 16, 17, 18, 19 and 20 of the Third Party and demands strict proof thereof.

11. In response to paragraph 21 of the Third Party Complaint, which realleges and incorporates the allegations contained in the preceding paragraphs of the Third Party Complaint, Flint realleges its responses to each incorporated paragraph as if repeated herein verbatim.

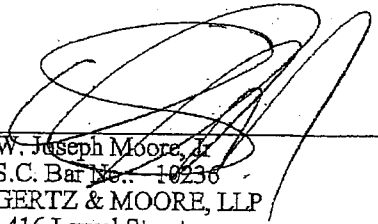
12. In responding to paragraph 22 of the third Party Complaint, Flint admits that as a corporations it is a person within the definition contained in S.C. Code §37-5-10(a).

13. Flint denies the allegations contained in paragraph 23, 24, 25, 26, 27 and 28 of the Third Party Complaint and demands strict proof thereof.

FOR A SECOND DEFENSE

14. The Answer and Counterclaim fails to state facts sufficient to constitute a claim or cause of action against the Plaintiff upon which relief can be granted.

WHEREFORE, Flint Equipment Co. as Third Party Defendant, having fully responded to the Third Party Complaint of the Defendant Third Party Plaintiff, prays said Third Party Complaint be dismissed with prejudice and Third Party Defendant be awarded the costs of this action and such other and further relief as the Court deems just and proper.



W. Joseph Moore, Jr.
S.C. Bar No. 10236
GERTZ & MOORE, LLP
1416 Laurel Street
P.O. Box 456
Columbia, SC 29202
(803) 252-1524
Attorneys for Flint Equipment Co.

June 13, 2013

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

John Deere Financial, f.s.b., f.k/a FPC Financial,
f.s.b.,

Plaintiff,

vs.

Jerry A. Bruce,

Defendant

and

Jerry A. Bruce,

Third-Party Plaintiff,

vs.

Flint Equipment Co.,

Third Party Defendant

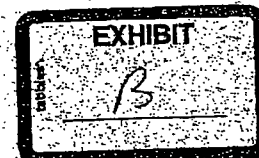
IN THE COURT OF COMMON PLEAS

Civil Action No.: 2011-CP-23-7943

**AFFIDAVIT IN SUPPORT OF
MOTION TO SET ASIDE DEFAULT**

PERSONALLY APPEARED BEFORE ME, Tony Sammons, who being first duly sworn
desposes and states as follows:

1. He is the Chief Financial Officer and Secretary of Flint Equipment Company.
2. Flint Equipment Company has employed CT Corporation System to act as its registered agent for service in the State of South Carolina.
3. Pursuant to the agreement with CT Corporation System all pleadings and other documents served upon CT Corporation System as agent of service for Flint Equipment Company are forwarded to his attention at Flint Equipment Company's home office located in Albany Georgia.
4. He is informed and believes that the Summons and Complaint in this matter were received by CT Corporation System, 2 Office Park Court, Suite 103 Columbia, South Carolina 29223.



5. He is further informed and believes that CT Corporation Systems forwarded the pleadings to Flint Equipment Company via Federal Express 2 Day delivery addressed to Tony Sammons, Flint Equipment Company, 1206 Blaylock Street, Albany Georgia 31705.

6. He is further informed and believes that the Federal Express package containing the pleadings was received by a receptionist or some other employee for Flint Equipment Company on or about February 13, 2013.

7. The Flint Equipment Company facility in Albany Georgia consist of three buildings and the undersigned's office is not located in the same building as that of the receptionist, therefore, mail and other deliveries are transferred by courier between the various buildings.

8. He is informed and believes that the pleadings in this matter were misplaced or mis-delivered and accordingly were not delivered to the undersigned upon receipt at Flint Equipment Company's facility in Albany Georgia..

9. As a result of the foregoing he did not receive the documents and was not aware of the pending litigation so as to be able to respond to the complaint within the time period provided by the summons.

10. He is aware of the serious nature of legal pleadings and of the importance of responding to legal matters within the time periods specified by the pleadings.

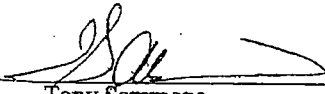
11. It is his practice to forward all legal matters to Flint Equipment Company's insurers and to its counsel immediately upon receipt so that a response can be made in a timely manner.

12. He is informed and believes that Flint Equipment Company has a meritorious defense to the claims asserted by Jerry A. Bruce, the Third-Party Plaintiff in this matter as follows:

- a. Flint Equipment Company performed repairs to the Defendant\Third Party Plaintiff's equipment at the request and with the authorization of the Defendant\Third Party Plaintiff;
- b. The Defendant\Third Party Plaintiff established the revolving line of credit for the purpose of paying for the repairs to the his equipment.
- c. The repairs to the equipment were completed in a timely manner;

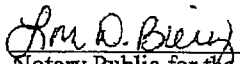
- d. The Defendant\Third Party Plaintiff took possession of the equipment upon the completion of the repairs with knowledge that the costs would be charged to the credit account.

FURTHER THE DEPONENT SAITH NOT.


Tony Sammons

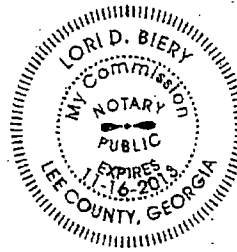
SWORN TO BEFORE ME THIS 7th

day of June, 2013


Notary Public for the State of

My Commission Expires

[NOTARY SEAL]



FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENSIMER
STATE OF SOUTH CAROLINA)
COUNTY OF GREENVILLE)
JUN 17 A 9:26)

John Deere Financials, f.s.b.

Plaintiff,

vs.

Jerry A. Bruce,

Defendant

AND

Jerry A. Bruce,

Third-Party Plaintiff,

vs.

Flint Equipment Co.,

Third-Party Defendant.

Civil Action No.: 2011-CP-23-7943

MEMORANDUM OF LAW IN SUPPORT
OF MOTIONS TO SET ASIDE ENTRY
OF DEFAULT OR DEFAULT
JUDGMENT, IF ENTERED AND TO
FILE LATE ANSWER

I. Statement of the Case

This is an action for fraud and Unfair Trade Practices ("UTP") arising from a debt collection action originally instigated by John Deere Financials, f.s.b., ("John Deere") against Defendant and Third-Party Plaintiff, Jerry A. Bruce, ("Bruce"). Bruce filed a complaint ("Bruce Complaint"), at issue herein, alleging third-party liability against Third-Party Defendant, Flint Equipment Co., ("Flint"), a Georgia corporation and dealer and authorized service provider of John Deere equipment with offices in Simpsonville, SC. The Bruce Complaint alleges that Flint, after performing repair services on Bruce's track hoe, had fraudulently submitted its repair charges to Plaintiff, John Deere Financials, f.s.b., ("John Deere") without Bruce's authorization.

The Bruce Complaint further alleges that such action by Flint violated South Carolina Unfair Trade Practices Act which allows recovery for treble-damage relief.

On November 30, 2012, John Deere initiated its action for debt collection ("original complaint") against Bruce. Bruce joined Flint as Third-Party Defendant in the Bruce Complaint, filed on February 8, 2013. However, the order from the Court allowing Bruce to add Flint was entered seven days later on February 15, 2013. The Bruce Complaint, but not original complaint, was served on Flint's registered agent in South Carolina, CT Corporation System ("CT") on or about February 9, 2013. As attested to in the attached affidavit by Tony Sammons, Flint's Chief Executive Officer and Secretary, CT sent the pleadings via Fed Ex to Flint's headquarters in Albany, GA. Fed Ex delivered said pleadings two days later in the hands of a receptionist in one of the buildings at Flint's headquarters. The pleadings were subsequently lost or misplaced; as a result, the appropriate officers within Flint never received them. Thus, Flint could not timely file its answer. Bruce filed its Affidavit on April 12th and its Motion for Default on May 24, 2013. Entry of default was granted on May 30, 2013 and a damages hearing as to Flint was scheduled for July 10, 2013. On June 4, 2013, Bruce notified Flint via Certified Mail that the hearing for default damages was scheduled on July 10, 2013. These Motions, Memorandum of Law and Affidavit are filed herein within ten (10) days of the receipt of the notice of hearing.

I. Statement of Law If No Default Judgment Has Been Entered

Under South Carolina law, two different standards apply in the court's decision to grant relief from default. After the entry of a default judgment, pursuant to S.C.R.C.P. 60(b)(1), relief may be granted where the default was caused by "mistake, inadvertence, surprise or excusable neglect". If no default judgment has been entered but only an entry of default, "good cause," a more lenient standard provided by S.C.R.C.P. 55(c), applies. This distinction is black letter law

in South Carolina. See *Wham v. Shearson Lehman Brothers, Inc.*, 381 S.E.2d 499 (S.C. App. 1989); *Ricks v. Weinrauch*, 360 S.E.2d 535, 293 S.C. 372 (S.C.App. 1987); and *In re Estate of Weeks*, 495 S.E.2d 454, 459 (S.C.App. 1997) (the most oft cited cases on the proper application of Rules 55(c) and 60(b)(1)).

In *Wham*, the appellant, Shearson, defendant in the action below, submitted an affidavit, claiming that, although the appropriate authority within the company received the complaint, it failed to timely answer due to "the press of other business." 381 S.E.2d 499, 500. Similar to the case at hand, an entry of default against Shearson had been filed and a default hearing scheduled. It was not until the hearing that Shearson moved to set aside default and file its answer. In denying Shearson relief, the magistrate had applied the more rigorous standard of "excusable neglect" under Rule 60(b)(1), compelling the Appeals Court to vacate and remand, declaring that the "broader, more liberal" standard of "good cause" controlled where a default judgment has not been entered. *Id* at 501. See also *Top Value Homes v. Harden*, 319 S.C. 302 (Ct. App. 1995).

A. *Wham* Factors

In determining whether relief is appropriate under S.C.R.C.P. Rules 55(c) and 60(b)(1), the Court must consider three factors: "(1) the timing of [the Defendant's] motion for relief; (2) whether [the Defendant] has a meritorious defense; and (3) the degree of prejudice to [Plaintiff] if the requested relief is granted." *Wham* at 502. See also *Weeks*, 495 S.E.2d 454, 459 (S.C.App. 1997). Furthermore, under South Carolina law, "Rule 55(c) is to be liberally construed so as to promote justice and dispose of cases on the merits." *Weeks* at 459.

The decision to grant equitable relief, either under the "good cause" standard of Rule 55(c) or for mistake and excusable neglect under Rule 60(b)(1), lies "solely within the sound

discretion of the trial court... [and] will [only] be set aside if it is controlled by some error of law or lacks evidentiary support." *Wham* at 501. In reaching its opinion, the court in *Wham* relies on its earlier ruling, *Ricks v. Weinrauch*, 360 S.E.2d 535, in which the court refused to overturn a lower court's exercise of its discretionary powers in granting relief from an entry of default under Rule 55(c).

The above mentioned factors, properly applied to the facts at hand, weigh in favor of granting relief. These Motions and Memorandum of Law and Flint's Answer are submitted herein within ten days of the receipt of the notice of damages hearing, when Flint first realized that a legal action had been instigated against it. Unlike the defendant in *Wham*, Flint did not fail to answer the Bruce Complaint due to other pressing business. Rather, due to irregularities in its courier service at its corporate headquarters, the appropriate officers of the corporation did not receive the Bruce Complaint until after default was entered.

Flint has as its defense the fact that it did perform the repair services requested by Bruce and properly charged the account established by Bruce for the purpose of paying for such repairs; pursuant to the account agreement, additional authorization from Bruce was not required before repair services are submitted to John Deere. Moreover, as no discovery has been conducted, the Plaintiff will not be prejudiced if it actually has to litigate its claim. In our jurisdiction, having to litigate one's claim does not comport with the standard for prejudice to plaintiff. See *United States v. Moradi*, 673 F.2d 725 (4th Cir. 1982). The facts at hand present exactly the type of circumstances to warrant a finding of "good cause."

B. Court's Discretion Is Guided by Notions of Equity

As the court in *Ricks* announced, "[the] element of discretion ... makes it clear the party requesting a judgment by default is not entitled to one as of right, even when the defendant is

technically in default.” 360 S.E.2d 535, 536. Without relief, Bruce will receive a windfall, and Flint will incur liability for, treble damages attendant with the Plaintiff’s UTP claim, without the Court ever seeing a shred of evidence, much less weighing the merits of the allegations. Such a result would violate the bedrock maxim that equity abhors forfeiture, as well as undermining the fundamental policy, announced by the court in *Weeks*, of promoting justice and disposing cases on the merits, inherent to the existence of Rule 55(c).

II. Statement of Law if Default Judgment Has Been Entered

Alternatively, if a Default Judgment has been entered, Flint repeats its arguments above and submits that the default was the result of a mistake and excusable neglect, pursuant to Rule 60(b)(1).

The appropriate officers at Flint never received the original Complaint due to the fact that FedEx placed it in the hands of a receptionist not authorized to receive the pleadings and irregularities in the mail delivery system within Flint’s headquarters resulted in mis-delivery.

- Flint acted in good faith when it received notice of the damages hearing by contacting Plaintiff’s counsel in an attempt to explain the default and resolve the matter;
- Defendant timely moved for relief from default by filing this motion within ten days of learning of the judgment;
- Defendant has a number of meritorious defenses, as mentioned above.
- Plaintiff will suffer no prejudice by setting aside default other than not having to litigate the case.

Directly on point is *Roberts v. Peterson*, 355 S.E.2d 280, 281 (S.C.App. 1987) where the appellate court granted relief from default judgment in the interest of disposing cases on their merits. The defendant-teacher in *Roberts* had timely forwarded a personal-injury complaint to

the school board, which then failed to forward the pleadings timely to its counsel and insurer. The court found that the school board was negligent, "but not necessarily inexcusably negligent...[its] failure to act was more excusable...than the cases involving attorneys or insurance companies." *Id* at 281. Likewise, the misplacement of the pleadings at Flint's headquarters does not rise to the level of inexcusable neglect, as no mistake by counsel or insurance company were implicated.

III. Relief Because Default Judgment Is Void

Flint additionally submits that the default judgment is void, pursuant to Rule 60(b)(4), because of jurisdictional defect caused by the Plaintiff's failure to comply with Rule 14 which in turn led to defective service of process. Under S.C.R.P. 14(a), a third-party plaintiff, such as Bruce, must obtain leave of the court *before* joining third-party defendant, Flint, in the action. Bruce filed and served Flint its Third-Party Complaint on February 8, 2013, seven days prior to the Court's order permitting Flint to be joined as third-party defendant.

Although our jurisdiction has not had not had the opportunity to address this issue directly, other courts have stated:

The joinder of an additional defendant by the filing of a supplemental summons and amended complaint may be accomplished only with prior judicial permission, and noncompliance renders the pleadings jurisdictionally defective...a plaintiff seeking to add a defendant in most cases must first apply for, and then await, judicial permission.

Perez v. Paramount Communications, Inc., 92 N.Y.2d 749, 749 (N.Y.S. 1999). See also *Crook v. E.I. du Pont de Nemours Co.* 582 N.Y.S.2d 581 (N.Y.S. 1192).

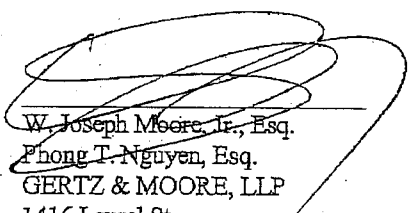
Rule 14(a) does allow third-party plaintiffs to file a third-party complaint without leave of the court if "he files the third-party complaint not later than 10 days after he serves his original

answer." However, the Bruce Complaint was filed almost three months after John Deere had filed its original complaint in November 2011.

Service to Flint's registered agent on February 8 was not perfected because at that time Bruce did not have leave of the Court to join Flint. Without the Court's permission, the Bruce Complaint was untimely and jurisdictionally defective at the time it was served. Thus, the court did not have personal jurisdiction over Flint on February 8, rendering any default judgment based on the Bruce Complaint void.

C. Conclusion

As no default judgment against Flint has been entered, Flint respectfully submits its Motion and Memorandum of Law, Affidavit and Answer in support of its request for relief from the entry of default, under the "good cause" standard under S.C.R.C.P. 55. If a default judgment has been entered, the facts at hand amply fulfill the requirements established under South Carolina law, justifying the Court's exercise of its discretion to grant relief for mistake and excusable neglect under S.C.R.C.P. 60(b)(1). Finally, Bruce's noncompliance with S.C.R.C.P. 14 renders any judgment based upon the Bruce Complaint jurisdictionally defective and void due to the lack of service, entitling Flint to relief pursuant to S.C.R.C.P. 60(b)(1).



W. Joseph Moore, Jr., Esq.
Phong T. Nguyen, Esq.
GERTZ & MOORE, LLP
1416 Laurel St.
P.O. Box 456
Columbia, SC 29201
(803) 252-1524, #2

June 13, 2013
Columbia, SC

STATE OF SOUTH CAROLINA, CLERK OF COURT
GREENVILLE CO. S.C.
COUNTY OF GREENVILLE PAUL B. WICKENSIMER IN THE COURT OF COMMON PLEAS
C/A NO: 2011-CP-23-07943

John Deere Financials, f.s.b., 2013 JUN 17 A 9 26
Plaintiff,

vs.

Jerry A. Bruce,
Defendant,

AND

Jerry A. Bruce,
Third-Party Plaintiff,

vs.

Flint Equipment Co.,
Third-Party Defendant.

CERTIFICATE OF SERVICE

The undersigned, a Paralegal with Gertz & Moore, LLP, attorney for Third-Party Defendant does certify that on the 13th day of June, 2013 I served a copy of the documents listed below upon the Plaintiff, Defendant, and Third-Party Defendant via *United States Mail First Class*, addressed as follows:

O.W. Bannister, Esquire
Bannister & Wyatt, LLC
PO Box 10007
Greenville, SC 29603

B. Craig H. Allen
605 Pettigru Street
Greenville, SC 29601

Attorney for Plaintiff

Attorney for Defendant and Third-Party
Plaintiff

Documents served: *Notice of Motion and Motions to Set Aside Default Entry or Default Judgment and for Leave to File Answer*

Memorandum of Law in Support of Motions to Set Aside Entry of Default or Default Judgment, if Entered and to File Late Answer



Tina Auten

Columbia, South Carolina

7/2/2013

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

John Deere Financial, f.s.b.,
f/k/a FPC Financial, f.s.b.,

Plaintiff,

vs.

Jerry A. Bruce,

Defendant,

AND

Jerry A. Bruce,

Third-Party Plaintiff,

vs.

Flint Equipment Co.,

Third-Party Defendant.

FILED-CLERK OF COURT
GREENVILLE COUNTY
PAUL B. WICKENS
IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT

2013 JUL -2 P 3:10

C.A. No.: 2011-CP-23-7943

**MEMORANDUM IN OPPOSITION
TO THIRD PARTY DEFENDANT'S
MOTION TO SET ASIDE
DEFAULT ENTRY OR DEFAULT
JUDGMENT AND FOR LEAVE TO
FILE ANSWER**

Third Party Defendant, Flint Equipment Company, (Flint) moved to set aside a Judgment of Default entered by the Honorable D. Garrison Hill on May 30, 2013. While Flint argues the lower standard for setting aside default under Rule 55(c) SCRPC, the correct standard for setting aside default is Rule 60(b)(1).

Under Rule 60(b)(1) Flint may be relieved of the default judgment for "mistake, inadvertence, surprise, or excusable neglect." In support of its motion, Flint filed an affidavit of one Tony Sammons who identified himself as the Chief Financial Officer and Secretary of Flint Equipment Company (Aff. Tony Sammons, attached to Flint's Motion). Sammons acknowledges Flint received the Third-Party Complaint on February 13, 2013 at its corporate headquarters. Sammons further believes the pleadings were "misplaced or mis-delivered and accordingly were not delivered" to him.

Flint cites a single decision in support of setting aside the default, Roberts v. Peterson,

292 SC 149, 355 SE 2d 280 (Ct. App. 1987). The facts of the Peterson case are vastly different from the facts of this case. Peterson was a teacher in a public school who was sued by a student for injuries received in a chemistry lab accident. Peterson gave the suit papers to her principal and the school authorities failed to notify the school district attorney or insurance company timely. A default judgment was obtained.

In reversing the default, the Court of Appeals pointed out that Peterson could not seek recourse against the principal or the school district for failure to act. The Court also pointed out that Peterson, the principal and the school officials were educators and not litigators.

Flint, on the other hand, is well versed in litigation. A system was set up to defend lawsuits (Sammons affidavit). Failure of their system to work is not excusable neglect. If it is, every corporate defendant can lose complaints in the office and claim excusable neglect.

Flint selected, hired, and trained personnel at its home office. Any negligence by the home office personnel is attributable to Flint. See Sundown v. Intedge Industries 383 SC 601, 681 SE 2d 885 (S.C. 2009).

While Flint has demonstrated neglect, it fails to establish any excuse. Under these circumstances the default should not be set aside.

Flint also moved to set aside the default judgment under Rule 60(b)(4) on the grounds the default judgment is void. The basis for this claim is that the written Court Order (Form 4) allowing the Third Party Action was filed after the Third Party Complaint was filed and served.

The chronology of events is as follows:

December 6, 2012 – Jerry Bruce files motion to add Flint pursuant to Rule 14(a)SCRCP.

February 5, 2013 – Bruce's motion is heard by Judge Verdin who rules from the bench that Bruce can sue Flint.

February 8, 2013 – Bruce files Third Party Complaint.

February 11, 2013 – CT Corporation signs receipt for Third Party Complaint for Flint.

February 15, 2013 – Judge Verdin files Form 4 Order confirming her oral Order allowing Flint to be made a party.

Flint argues that the oral ruling of Judge Verdin on February 5, 2013 has no efficacy. Thus Flint argues the oral Order is void. Continuing on, Flint argues the Complaint was void for lack of judicial permission to join Flint as a party at the time Flint was served.

The Flint argument rests on Judge Verdin's oral Order having no effect.

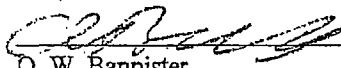
Numerous South Carolina cases hold that the filed Order of a judge is the Final Order and not oral pronouncement from the bench. See Serowski v Serowski 381 SC 306, 672 SE 2d 589 (Ct. App. 2009). No cases hold the oral Order of a judge has no effect until reduced to a filed Order.

In Linda Mc Co. Inc. v Shore 390 SC 543, 703 SE 2d 499 (S.C. 2010) the Supreme Court determined that void judgments under Rule 60(b)(4) were limited to judgments where the Court failed to provide due process or lacked subject matter or personal jurisdiction.

In the absence of any of these claims, Flint's motion must fail.

Respectfully submitted,

BANNISTER & WYATT, LLC


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*Attorney for Jerry Bruce, Defendant/
Third Party Plaintiff*

July 2, 2013

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS

John Deere Financial, f.s.b., Aka FPC Financial,
f.s.b.,

Plaintiff,

vs.

Jerry A. Bruce,

Defendant

and

Jerry A. Bruce,

Third-Party Plaintiff,

vs.

Flint Equipment Co.,

Third-Party Defendant

Civil Action No.: 2011-CP-23-7943

**NOTICE OF MOTION AND MOTION TO
DISMISS THE THIRD PARTY
COMPLAINT PURSUANT TO
SCRCP RULE 12(b)**

TO: O.W. Bannister, Esquire, Bannister & Wyatt, LLC, Attorney for Jerry A. Bruce,
Defendant\Third-Party Plaintiff

PLEASE TAKE NOTICE that the undersigned as attorney for the Third-Party Defendant Flint Equipment Co. (hereinafter "Flint"), will ten (10) days from the date hereof or as soon thereafter as counsel may be heard, move before the Honorable Edward W. Miller, presiding judge for the Court of Common Pleas for Greenville County, for an Order dismissing the Third-Party Plaintiff's complaint in the above entitled matter pursuant to Rule 12(b)(1), (2), (4) and (5) of the South Carolina Rules of Civil Procedure. This motion is made on the grounds that the Defendant\Third-Party Plaintiff failed to comply with the requirements of SCRCP Rule 14(a) in the filing and service of the Third-Party Complaint as follows:

This motion is based on the following:

1. SCRCP Rule 14(a) required the Defendant \Third-Party Plaintiff to obtain leave of the court prior to the filing and service of the Third-Party Complaint in this matter

because the Third-Party Complaint was filed approximately one year after the service of the original answer of the Defendant.

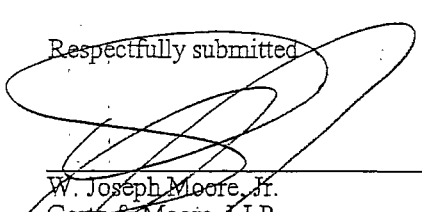
2. By order dated February 12, 2013 and entered February 15, 2013, the Defendant\Third-Party Plaintiff was granted leave to file a third-party complaint against Flint Equipment Company.
3. The Defendant\Third-Party Plaintiff filed the Summons and Third-Party Complaint and attempted to serve same of the Defendant Flint Equipment Co. by certified mail on February 8, 2013, seven (7) days before the order granting the Defendant leave to file the third-party complaint was entered.

As a result of the foregoing failure by the Defendant to comply with the requirements of SCRCP Rule 14(a),

1. The Third-Party Complaint filed on February 8, 2013 was filed without leave of the court and is therefore void and as such the Court lacks jurisdiction in this matter and the Third-Party Action should be dismissed pursuant to SCRCP Rule 12(b)(a).
2. The attempted service of the Third-Party Complaint prior to the entry of the order granting the Defendant leave to serve the pleading rendered the service void and ineffective. As a result the Third-Party Action should be dismissed pursuant to SCRCP Rule 12 (b)(2), (4) and (5).

Pursuant to SCRCP Rule 11(a) there is no duty to consult in connection with the foregoing motion to dismiss.

Respectfully submitted



W. Joseph Moore, Jr.
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(803) 252-1524
Attorneys for Flint Equipment Co.

July 1, 2013

7/5/2013

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

John Deere Financials, f.s.b.
Plaintiff,

vs.

Jerry A. Bruce,
Defendant

AND

Jerry A. Bruce,
Third-Party Plaintiff,

vs.

Flint Equipment Co.,
Third-Party Defendant.

THE COURT OF COMMON PLEAS

Civil Action No.: 2011-CP-23-7943

REVISED MEMORANDUM OF LAW IN
SUPPORT OF MOTIONS TO SET ASIDE
ENTRY OF DEFAULT OR DEFAULT
JUDGMENT, IF ENTERED AND TO
FILE LATE ANSWER

I. Statement of the Case

This is an action for fraud and Unfair Trade Practices ("UTP") arising from a debt collection action originally instigated by John Deere Financials, f.s.b., ("John Deere") against Defendant and Third-Party Plaintiff, Jerry A. Bruce, ("Bruce"). Bruce filed a complaint ("Bruce Complaint"), at issue herein, alleging third-party liability against Third-Party Defendant, Flint Equipment Co., ("Flint"), a Georgia corporation and dealer and authorized service provider of John Deere equipment with offices in Simpsonville, SC. The Bruce Complaint alleges that Flint, after performing repair services on Bruce's track hoe, had fraudulently submitted its repair charges to Plaintiff, John Deere Financials, f.s.b., ("John Deere") without Bruce's authorization.

The Bruce Complaint further alleges that such action by Flint violated South Carolina Unfair Trade Practices Act which allows recovery for treble-damage relief.

On November 30, 2011, John Deere initiated its action for debt collection ("original complaint") against Bruce. Bruce filed his answer to the John Deere Complaint on December 19, 2011. Bruce joined Flint as Third-Party Defendant approximately fourteen (14) months later in the Bruce Complaint, filed on February 8, 2013. However, the order from the Court allowing Bruce to add Flint was entered seven days later on February 15, 2013. The Bruce Complaint, but not the original complaint, was served on Flint's registered agent in South Carolina, CT Corporation System ("CT") on or about February 9, 2013. As attested to in the attached affidavit by Tony Sammons, Flint's Chief Executive Officer and Secretary, CT sent the pleadings via Fed Ex to Flint's headquarters in Albany, GA. Fed Ex delivered said pleadings two days later in the hands of a receptionist in one of the buildings at Flint's headquarters. The pleadings were subsequently lost or misplaced; as a result, the appropriate officers within Flint never received them. Thus, Flint could not timely file its answer. Bruce filed its Affidavit on April 12th and its Motion for Default on May 24, 2013. Entry of default was granted on May 30, 2013 and a damages hearing as to Flint was scheduled for July 10, 2013. On June 4, 2013, Bruce notified Flint via Certified Mail that the hearing for default damages was scheduled on July 10, 2013. These Motions, Memorandum of Law and Affidavit are filed herein within ten (10) days of the receipt of the notice of hearing.

I. Statement of Law If No Default Judgment Has Been Entered

Under South Carolina law, two different standards apply in the court's decision to grant relief from default. After the entry of a default judgment, pursuant to S.C.R.C.P. 60(b)(1), relief may be granted where the default was caused by "mistake, inadvertence, surprise or excusable

neglect". If no default judgment has been entered but only an entry of default, "good cause," a more lenient standard provided by S.C.R.C.P. 55(c), applies. This distinction is black letter law in South Carolina. See *Wham v. Shearson Lehman Brothers, Inc.*, 381 S.E.2d 499 (S.C. App. 1989); *Ricks v. Weinrauch*, 360 S.E.2d 535, 293 S.C. 372 (S.C.App. 1987); and *In re Estate of Weeks*, 495 S.E.2d 454, 459 (S.C.App. 1997) (the most oft cited cases on the proper application of Rules 55(c) and 60(b)(1)).

In *Wham*, the appellant, Shearson, defendant in the action below, submitted an affidavit, claiming that, although the appropriate authority within the company received the complaint, it failed to timely answer due to "the press of other business." 381 S.E.2d 499, 500. Similar to the case at hand, an entry of default against Shearson had been filed and a default hearing scheduled. It was not until the hearing that Shearson moved to set aside default and file its answer. In denying Shearson relief, the magistrate had applied the more rigorous standard of "excusable neglect" under Rule 60(b)(1), compelling the Appeals Court to vacate and remand, declaring that the "broader, more liberal" standard of "good cause" controlled where a default judgment has not been entered. *Id* at 501. See also *Top Value Homes v. Harden*, 319 S.C. 302 (Ct. App. 1995).

A. *Wham* Factors

In determining whether relief is appropriate under S.C.R.C.P. Rules 55(c) and 60(b)(1), the Court must consider three factors: "(1) the timing of [the Defendant's] motion for relief; (2) whether [the Defendant] has a meritorious defense; and (3) the degree of prejudice to [Plaintiff] if the requested relief is granted." *Wham* at 502. See also *Weeks*, 495 S.E.2d 454, 459 (S.C.App. 1997). Furthermore, under South Carolina law, "Rule 55(c) is to be liberally construed so as to promote justice and dispose of cases on the merits." *Weeks* at 459.

The decision to grant equitable relief, either under the "good cause" standard of Rule 55(c) or for mistake and excusable neglect under Rule 60(b)(1), lies "solely within the sound discretion of the trial court... [and] will [only] be set aside if it is controlled by some error of law or lacks evidentiary support." *Wham* at 501. In reaching its opinion, the court in *Wham* relies on its earlier ruling, *Ricks v. Weinrauch*, 360 S.E.2d 535, in which the court refused to overturn a lower court's exercise of its discretionary powers in granting relief from an entry of default under Rule 55(c).

The above mentioned factors, properly applied to the facts at hand, weigh in favor of granting relief. These Motions and Memorandum of Law and Flint's Answer are submitted herein within ten days of the receipt of the notice of damages hearing, when Flint first realized that a legal action had been instigated against it. Unlike the defendant in *Wham*, Flint did not fail to answer the Bruce Complaint due to other pressing business. Rather, due to irregularities in its courier service at its corporate headquarters, the appropriate officers of the corporation did not receive the Bruce Complaint until after default was entered.

Flint has as its defense the fact that it did perform the repair services requested by Bruce and properly charged the account established by Bruce for the purpose of paying for such repairs; pursuant to the account agreement, additional authorization from Bruce was not required before repair services are submitted to John Deere. Moreover, as no discovery has been conducted, the Plaintiff will not be prejudiced if it actually has to litigate its claim. In our jurisdiction, having to litigate one's claim does not comport with the standard for prejudice to plaintiff. See *United States v. Moradi*, 673 F.2d 725 (4th Cir. 1982). The facts at hand present exactly the type of circumstances to warrant a finding of "good cause."

B. Court's Discretion Is Guided by Notions of Equity

As the court in *Ricks* announced, "[the] element of discretion ... makes it clear the party requesting a judgment by default is not entitled to one as of right, even when the defendant is technically in default." 360 S.E.2d 535, 536. Without relief, Bruce will receive a windfall, and Flint will incur liability, of treble damages attendant with the Plaintiff's UTP claim, without the Court ever seeing a shred of evidence, much less weighing the merits of the allegations. Such a result would violate the bedrock maxim that equity abhors forfeiture, as well as undermining the fundamental policy, announced by the court in *Weeks*, of promoting justice and disposing cases on the merits, inherent to the existence of Rule 55(c).

II. Statement of Law if Default Judgment Has Been Entered

Alternatively, if a Default Judgment has been entered, Flint repeats its arguments above and submits that the default was the result of a mistake and excusable neglect, pursuant to Rule 60(b)(1).

The appropriate officers at Flint never received the original Complaint due to the fact that FedEx placed it in the hands of a receptionist not authorized to receive the pleadings and irregularities in the mail delivery system within Flint's headquarters resulted in mis-delivery.

- Flint acted in good faith when it received notice of the damages hearing by contacting Plaintiff's counsel in an attempt to explain the default and resolve the matter;
- Defendant timely moved for relief from default by filing this motion within ten days of learning of the judgment;
- Defendant has a number of meritorious defenses, as mentioned above.
- Plaintiff will suffer no prejudice by setting aside default other than not having to litigate the case.

Directly on point is *Roberts v. Peterson*, 355 S.E.2d 280, 281 (S.C.App. 1987) where the appellate court granted relief from default judgment in the interest of disposing cases on their merits. The defendant-teacher in *Roberts* had timely forwarded a personal-injury complaint to the school board, which then failed to forward the pleadings timely to its counsel and insurer. The court found that the school board was negligent, "but not necessarily inexcusably negligent...[its] failure to act was more excusable...than the cases involving attorneys or insurance companies." *Id.* at 281. Likewise, the misplacement of the pleadings at Flint's headquarters does not rise to the level of inexcusable neglect, as no mistake by counsel or insurance company was implicated.

III. Relief Because Default Judgment Is Void

Flint additionally submits that the default judgment is void, pursuant to Rule 60(b)(4), because of jurisdictional defect caused by the Plaintiff's failure to comply with Rule 14 which in turn rendered service of process defective. Under S.C.R.P. 14(a), a third-party plaintiff, such as Bruce, must obtain leave of the court *before* joining third-party defendant, Flint, in the action. On February 8, 2013, when Bruce filed and served Flint its Third-Party Complaint on Flint, Bruce did not have the Court's leave permitting Flint to be joined as third-party defendant and, at the time, the Court did not have supplemental jurisdiction.

Courts in the Fourth Circuit in dealing with the federal counterpart of Rule 14 have announced that a "[d]efendants' filing of a third party complaint ... without first obtaining leave of Court constitutes an improper filing." *Old Republic National Title Ins. Co. v. Warner*, Civil Action 1:10-CV-00071, U.S. District Court, W. V. (4th Cir. 2011). Courts in other jurisdictions have explained the consequences of such improper filing:

The joinder of an additional defendant by the filing of a supplemental summons and amended complaint may be accomplished only with prior

judicial permission, and noncompliance renders the pleadings jurisdictionally defective...a plaintiff seeking to add a defendant in most cases must first apply for, *and then await*, judicial permission.

Perez v. Paramount Communications, Inc., 92 N.Y.2d 749, 749 (N.Y.S. 1999). (Emphasis added.)

Rule 14(a) does allow a third-party plaintiff to file a third-party complaint without leave of the court if "he files the third-party complaint not later than 10 days after he serves his original answer." However, the Bruce Complaint was filed approximately fourteen (14) months after Bruce filed his answer to the John Deere complaint on December 19, 2011. Such delay and subsequent failure to obtain judicial permission prior to filing and serving the Third Party Complaint violates the policy announced in SCRCP 1, namely, that the Rules of Civil Procedure are "to be construed to secure the *just*, speedy, and inexpensive determination of every action."

Service to Flint's registered agent on February 8 was not perfected because at that time Bruce did not have leave of the Court to join Flint. Without judicial permission, the Bruce Complaint was untimely and jurisdictionally defective at the time it was served. Thus, the court did not have personal jurisdiction over Flint on February 8, rendering any default judgment based on the Bruce Complaint void.

Balancing Bruce's Violation of Rule 14 Against Flint's Excusable Neglect

In considering whether the Bruce Complaint's jurisdictional defect outweighs Flint's excusable neglect, which did not involve any mishandling by its attorneys, the Court must abide by the proscription of Rule 1 and weigh the underlying viability of Bruce's Third Party claims. It is well established law in South Carolina that Rule 14 bars the joinder of claims not based on secondary liability, such as a claim of indemnity or right of contribution. Relying on *Wright, Miller & Kane, Federal Practice and Procedure*, our Supreme Court determined that

"[u]nder Rule 14, the third-party plaintiff must have a substantive claim against the third-party defendant founded upon derivative liability. The outcome of the principal claim must impact the third-party defendant's liability." *First General Services of Charleston, Inc. v. Miller*, 445 S.E.2d 446, 314 S.C. 439 (S.C. 1994).

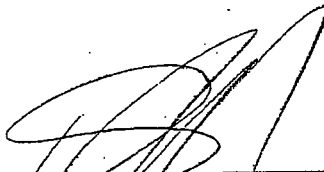
Precisely on point is *Beach v. Hudson*, 298 S.C. 424 (S.C.App. 1989). There the court affirmed the lower ruling to grant a motion to strike third party claims that were based, *inter alia*, on fraud and unfair trade practices, rather than on derivative liability for the original breach of contract action:

[T]he assertion against...additional parties of...additional causes of action in the third-party complaint involving...allegations...of fraud, negligence, recklessness, outrage, and unfair trade practices, treble damages, and repeated demands for punitive damages...will unduly complicate the adjudication of the relatively simple contract action brought by the plaintiffs... Indeed, the causes of action asserted by [the third party complaint], if tried alongside the plaintiffs' claim, would all but submerge the plaintiffs' claim. We find no abuse of discretion...even were we to conclude that each of the causes of action asserted therein under Rule 14(a) is... dependent on the outcome of the plaintiffs' claim...A third-party claim may be asserted under Rule 14(a) only when the third party's liability is in some way dependent on the outcome of the main claim or when the third party is secondarily liable to defendant.

Id. at 427. (Internal quotes and citation omitted.) The facts of *Hudson* directly mirror those before us. The substance of John Deere complaint is a simple breach of contract action; the Bruce Complaint sounds in fraud rather than derivative liability for that breach. The substance of the Bruce Complaint asserts that Flint submitted its repair charges fraudulently without authorization to John Deere. Bruce is not asserting that he is entitled to equitable, statutory or contractual indemnity from Flint. Flint has not issued any warranty to Bruce that it will make good any losses that Bruce suffers from not paying his repair bills. Neither is a question of contributory negligence implicated.

C. Conclusion

As no default judgment against Flint has been entered, Flint respectfully submits its Motion and Memorandum of Law, Affidavit and Answer in support of its request for relief from the entry of default, under the "good cause" standard under S.C.R.C.P. 55. If a default judgment has been entered, the facts at hand amply fulfill the requirements established under South Carolina law, justifying the Court's exercise of its discretion to grant relief for mistake and excusable neglect under S.C.R.C.P. 60(b)(1). Finally, Bruce's noncompliance with S.C.R.C.P. 14 renders any judgment based upon the Bruce Complaint jurisdictionally defective and void due to the lack of service, entitling Flint to relief pursuant to S.C.R.C.P. 60(b)(1).



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July 5, 2013
Columbia, SC

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

John Deere Financials, f.s.b.,
Plaintiff,

vs.

Jerry A. Bruce,
Defendant,

AND

Jerry A. Bruce,
Third-Party Plaintiff,

vs.

Flint Equipment Co.,
Third-Party Defendant.

IN THE COURT OF COMMON PLEAS

C/A NO: 2011-CP-23-07943

CERTIFICATE OF SERVICE

The undersigned, attorney with Gertz & Moore, LLP, attorneys for Third-Party Defendant does certify that on the 5th day of July, 2013 I served a copy of the documents listed below upon counsel of record for the Plaintiff and Defendant Third Party Plaintiff, via *United States Mail First Class*, addressed as follows:

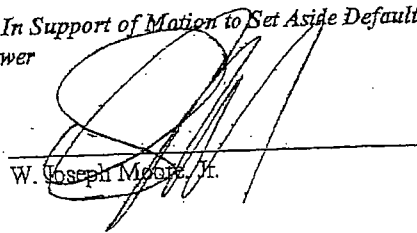
O.W. Bannister, Esquire
Bannister & Wyatt, LLC
PO Box 10007
Greenville, SC 29603

Attorney for Defendant and Third-Party
Plaintiff

B. Craig H. Allen
605 Pettigru Street
Greenville, SC 29601

Attorney for Plaintiff

Documents served: *Revised Memorandum of Law In Support of Motion to Set Aside Default
and for Leave to File Late Answer*


W. Joseph Moore, Jr.

Columbia, South Carolina

1 STATE OF SOUTH CAROLINA)
 2) COURT OF COMMON PLEAS
 2) 2011-CP-23-7943
 COUNTY OF GREENVILLE)
 3)
 4)
 John Deere Financial) TRANSCRIPT OF RECORD
 5)
 6)
 -vs-)
 7)
 Jerry A. Bruce)

8
 9 July 13, 2013
 Greenville, South Carolina

10 B E F O R E:

11 THE HONORABLE EDWARD W. MILLER, Judge.

12 A P P E A R A N C E S

13 Craig Allen, Esquire
 Plaintiff, John Deere Financial

14 William Bannister, Esquire
 Defendant Jerry Bruce

15 W. Joseph Moore, Esquire
 Third Party Defendant Flint Equipment Co.

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 18 CAROLINE HISKELL
 19 Thirteenth Circuit Court Reporter
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I N D E X

WITNESSES	DR	CR	RED	REC
Jerry Bruce	12	22	34	35
Franklin McClearn	38	41	43	

E X H I B I T

DEFENDANT'S	ID	IN EVD
1 Document	13	13
2 Agreement	20	20
3 Affidavit	21	21

Deere vs. Bruce

P R O C E E D I N G S

1
2 THE COURT: John Deere Financial vs. Flint
3 Equipment Co. Okay.

4 MR. BANNISTER: Judge, there are two motions
5 here, one is to set aside the default and we're having a
6 damage hearing. Probably for judicial economy here, we
7 should do the set aside the default first.

8 THE COURT: Okay.

9 MR. MOORE: Your Honor, my name is Joe Moore.
10 I represent Flint Equipment Company, the third party
11 defendant in this matter.

12 We filed a motion to set aside the default or
13 if the default judgment has been entered for relief from
14 the default judgment and leave to file an answer in this
15 matter.

16 Your Honor, there is an affidavit of Tony
17 Samons, the CFO of Flint Equipment Company attached to our
18 motion in support of our request for relief, Your Honor.
19 To summary in Mr. Samons's affidavit, Flint acknowledges
20 that the third party complaint was served on CT
21 Corporations systems, its registered agent here in South
22 Carolina, and the CT Corporations System forwarded the
23 summons and complaint to Flint's headquarters in Georgia.

24 Your Honor, at that point the summons and
25 complaint disappears. It never was received by

Deere vs. Bruce

1 Mr. Samons, the party responsible for receiving summons
2 and complaints. We don't know if it got lost in our
3 office mail. Your Honor, or it got misfiled. Nobody
4 seems to know what happened to the complaint.

5 Your Honor, the assumption is that since the
6 complaint was labeled Tohn Tier Financial Services SFB as
7 plaintiff, somebody may have just assumed that it was a
8 lawsuit for a collection for one of John Deere's accounts
9 and it had gotten filed accordingly, but nobody knows
10 because nobody knows what happened to it.

11 It never got to Mr. Samons. He never turned
12 it over to the insurance company or to corporate counsel
13 because he didn't know it had been filed. The next thing
14 he knew when he found out about it is when he received
15 notice of the default hearing on June 4th at which time he
16 contacted our office.

17 We obtained what information we could out of
18 the court file and filed the motion within 10 days of the
19 receipt of the notice to our office, Your Honor.

20 Your Honor, we'd argument that under the
21 circumstances that this case is analogist to the Wham
22 versus Sherson Leiman case which is referenced in our
23 brief.

24 In that case as in this case, Your Honor,
25 entry of default had been made but there's no record in

Deere vs. Bruce

1 the Clerk's Office that a judgment of default has actually
2 been entered. Accordingly, Your Honor, we would argue
3 that the standard of 55(c) should apply to the motion for
4 relief of default, Your Honor. But even if the Court
5 deems that default judgment has been entered and we're
6 under the stricter standard of Rule 60, Your Honor, we
7 would argue that the matters alleged in the affidavit of
8 Mr. Samons arises to the standard of mistake, excusable
9 neglect, and inadvertence, and for those reasons Flint
10 should be entitled to relief from default judgment, Your
11 Honor.

12 In addition, Your Honor, we would allege that
13 the default judgment is void. Your honor, this is a third
14 party complaint filed more than a year after the filing of
15 the initial complaint and therefore under Rule 14a the
16 defendant was required to obtain leave from the court
17 prior to filing and serving the complaint.

18 Your Honor, the third party complaint was
19 filed on February 8, 2013 and was mailed certified mail on
20 CT Corporation on February 8, 2013. It was received by CT
21 Corporation on February 11th. Your Honor, the actual
22 order granting leave to amend the complaint or assert the
23 third party complaint for granting leave to serve it was
24 not signed until February 12th, approximately four days
25 after the complaint was filed and it was not filed in the

Deere vs. Bruce

1 Clerk's Office until February 15th.

2 I understand ---

3 THE COURT: How does that work?

4 MR. BANNISTER: I think that motion is set
5 for September 3rd. I got notice they filed a motion ---

6 MR. MOORE: We also filed a motion to dismiss
7 for lack of jurisdiction but this goes to our argument
8 under Rule 60 that the judgment is void and therefore
9 we're entitled to relief from the default judgment.

10 THE COURT: I thought you said the complaint
11 was filed February 11th and then you said it was filed in
12 the Clerk's Office February 15th. What do you mean?

13 MR. MOORE: The complaint was actually filed
14 on February 8th, the third-party complaint, but the order
15 granting the defendant leave to file the third-party
16 complaint was not filed for seven days later on February
17 15th. Our argument would be they jumped the gun by seven
18 days and therefore, they did not have authority to file
19 the third party complaint at the time it was filed and
20 served.

21 We would also argue that under Rule 14a, that
22 an action for a third party complaint is well established
23 in South Carolina that that has to be an action for
24 derivative liability. It clearly states that a third-
25 party complaint is at or where you allege that the third

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1 party defendant owes you the money that the plaintiff is
2 claiming you owe them. Your Honor, in this case the third
3 party plaintiff is asserting two causes of action against
4 the third party defendant, the first being for fraud and
5 deceit, and the second one being for unfair trade
6 practices.

7 The main case is the one filed by John Deere
8 against the defendant for recovery of money that is owed
9 on a power plant account, which is basically a credit
10 account for repairs.

11 Under the case of Beech versus Hudson which
12 is also cited in our brief 298 SC 424, the Supreme Court
13 clearly states third party complaints must be a derivative
14 cause of action and that a third party complaint is not --
15 or unfair trade practices is not probable. Your Honor, we
16 argue that their failure to comply with Rule 14a results
17 subject jurisdictional defect and therefore the judgment
18 is void, Your Honor, and we request that it be set aside.

19 MR. BANNISTER: May I respond?

20 THE COURT: Yes, sir.

21 MR. BANNISTER: First, Your Honor, there is
22 an order of default and an order setting a damages
23 hearing. My copy shows it was filed May 30, 2013 so I
24 believe, I don't know what record he's looking at, but I
25 have a filed copy signed by Judge Hill entering an order

Deere vs. Bruce

1 of default.

2 THE COURT: It's dated May 28, filed May
3 30th. It says that Flint Equipment Company was served
4 February 8th, affidavit of service filed February 11, 2013
5 and third party defendant failed to file and answer or
6 respond or otherwise plead as of April 12, 2013.

7 Is that right?

8 MR. BANNISTER: There is an order of default.
9 He says there's an affidavit of default but there's an
10 order of default.

11 MR. MOORE: Your Honor, I acknowledge there's
12 an order entering default, but in the Sherston versus Wynn
13 case the same thing happened and the court entered a
14 default but the actually default judgment was not entered
15 and in this case there is no notation in the Clerk's file
16 that an judgment has actually been entered, Your Honor.
17 And that's what triggers the higher standard of Rule 60.
18 I acknowledge that's a technical argument, but I think
19 even if we go to the standard of Rule 60 the affidavit
20 provided by my client meets that standard and the default
21 should be lifted and they be allowed to file an answer.

22 As I said in the alternative, Your Honor, and
23 I can hand up a copy of the Rule 4 that was filed on
24 February 15th that granted them leave to amend the
25 complaint, and as I said, Your Honor, that's seven days

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1 after the filing of the complaint and the service of the
2 complaint, so at the time it was filed, it was not
3 authorized by the court.

4 MR. BANNISTER: We had a hearing before Judge
5 Verdin on February 5th. Judge Verdin ruled from the bench
6 that she was admitting the third party complaint to be
7 filed. She followed it up with a Form 4 order sometime
8 later. It's our position that the oral order from Judge
9 Verdin commissioned the filing. Had Judge Verdin changed
10 her mind and filed a later order differently, you would
11 have another order. But you have the administrator
12 entering on the record on our motion that we had, in fact,
13 been granted permission to file.

14 THE COURT: I believe that sounds like a
15 correct statement.

16 MR. MOORE: And again, I wasn't present at
17 the hearing, because if I had been, I'd known that a
18 third-party action had been filed and it never would have
19 gotten to my client, Your Honor. I am just relying on
20 what's in the court's records in making my argument.

21 THE COURT: Sure, I understand that.

22 MR. BANNISTER: Judge, I have a witness here
23 who was here at the hearing, Mr. Allen who's an attorney.
24 He was here February 5th when Judge Verdin issued her
25 order.

Deere versus Bruce

1 THE COURT: You want to call him?

2 MR. MOORE: I don't dispute he was there.

3 THE COURT: Yeah, I think as an officer of
4 the court, we take your word for it, Mr. Bannister. I'm
5 not going to put Mr. Allen on the stand under that duress.

6 MR. MOORE: We would still rest on our
7 argument that the affidavit of our client where this is
8 not a situation where the complaint went to an attorney
9 and sat on an attorney's desk. It is not a situation
10 where it actually got received by a person who was
11 supposed to receive it and he didn't fail to act on it.
12 This situation effectively dropped off the face of the
13 earth and never got where it was supposed to be so the
14 person did not even know it existed. We acknowledge that
15 CT Corporation got served and not disputing that fact.

16 THE COURT: Okay. Any other assertions you
17 make are just speculative?

18 MR. MOORE: Correct, Your Honor, as supported
19 by the affidavit of the client.

20 THE COURT: Where is CT Corporation in this?

21 MR. BANNISTER: As my understanding from the
22 affidavit, CT Corporation forwarded by Federal Express and
23 they acknowledge receipt in Mr. Simmons affidavit at the
24 home office and they acknowledge they got it at the home
25 office and it went into the cloud or whatever, who knows.

Bruce - Direct

1 THE COURT: I'm not sure that qualifies under
2 Rule 60.

3 MR. MOORE: Our final argument would be that
4 under 14a, Your Honor, the matter alleged in the claim are
5 not proper under 14a because none of them are derivative
6 actions for indemnity for contribution for (inaudible),
7 and therefore, fraud and deceit and for unfair trade
8 practices and as such since they are not derivative
9 actions, they don't quality under 14a and the doesn't have
10 subject matter jurisdiction on those issues at this point,
11 Your honor.

12 THE COURT: And that's a motion set for?

13 MR. MOORE: Your Honor, that's a motion
14 that's been set for September 3rd on our motion to
15 dismiss, but it's also relevant to our argument under Rule
16 60, the underlying judgment is void and should be set
17 aside for that reason. Subject matter jurisdiction can be
18 raised at any time.

19 THE COURT: A judge already ruled that you
20 could file it, am I right?

21 MR. BANNISTER: Not only file it, but it has
22 been filed and it has been found to be in default.

23 THE COURT: I'm not sure I'm in a position to
24 overrule the ruling of a fellow circuit court judge. I
25 think the commonty(ph) would prevent me from doing that.

Bruce - Direct

1 So well stated arguments, denied.

2 MR. BANNISTER: Your Honor, we are prepared
3 to go forward on our damages and I would state to the
4 Court that under the well-pled and admitted by default
5 pleading under the first cause of action for fraud and the
6 second cause of action, we would call Mr. Bruce to go
7 forward under the unfair trade practices.

8 THE CLERK: Place your left hand on the Bible
9 and raise your right hand.

10 JERRY BRUCE, having been duly sworn,
11 testified for the record.

12 DIRECT EXAMINATION

13 BY MR. BANNISTER:

14 Q. State your name for the record.

15 A. Jerry Allen Bruce.

16 Q. Mr. Bruce, as a result of Flint Equipment Company
17 charging you for parts that you did not authorize them to
18 make to John Deere Credit, were you sued or have you been
19 sued by John Deere Credit?

20 A. I have.

21 Q. And that's a credit line that you had?

22 A. Yes, sir, I was in excellent standing with John
23 Deere Credit and they just charged it to my credit line.

24 Q. I'm going to ask you if this is what you been
25 sued for plus attorney fees on John Deere's suit?

Bruce - Direct

1 A. It is.

2 MR. BANNISTER: Let me mark it.

3 THE COURT: You got sued for a piece of
4 paper?

5 THE WITNESS: Yes, sir.

6 (Document marked as Defendant's Exhibit No. 1
7 for identification and admitted into evidence.)

8 BY MR. BANNISTER:

9 Q. You bought track hoe from Flint Equipment
10 Company?

11 A. I did, brand new.

12 Q. How much did you pay for?

13 A. Right at about \$150,000.

14 Q. And how did you finance it?

15 A. I paid \$40-something thousand dollars down and
16 John Deere Credit Powerplan, I assume, financed \$100,000.

17 Q. And you paid that off?

18 A. I did. I paid that off in the time that it was
19 allotted.

20 Q. Never missed a payment?

21 A. No, sir.

22 Q. Now, this is on the issue of the track hoe. Did
23 you have problems with the track hoe where the boom
24 burst?

25 A. I did. About less than a year of owning the

Bruce - Direct

1 machine, my operator, the guy that was operating it for me
2 said, Jerry, your boom is cracking and it had cracked
3 about three inches on each side of the boom. It had a
4 thumb on it and you were able to pick up stuff with the
5 thumb. Flint Equipment installed the thumb. When I
6 bought it, they installed it and they told me that what
7 they wanted to do.

8 Q. You're talking about Flint?

9 A. Yes, sir. They told me was to cut my thumb back
10 off, back off the machine, off the boom, and that's what
11 the part is called the boom -- put the back-end plate
12 behind it that was supposed to have been put behind it by
13 factory specifications and weld it back on and weld my
14 boom back up and give it back to me. And I told them that
15 was unacceptable. It's like you buying a new car and me
16 backing into it and all I do it bang it out and give it
17 back to you.

18 Q. As a result of that, did you have a lawsuit?

19 A. I did.

20 Q. And as a result of the lawsuit, did you get a new
21 boom?

22 A. I did.

23 Q. Did the manager of Flint Equipment say anything
24 to you after that legal action about them putting a new
25 boom on it?

Bruce - Direct

1 A. We went to a mediation and their attorney said
2 that Flint Equipment installed this boom correctly and
3 said we got pictures to prove it and they showed the
4 picture and it showed that the back-end plate was not
5 there. And I said this is all the proof you need and this
6 is your pictures and it shows it's not there. So they
7 paid for the new boom. Well, the service manager,
8 Mr. Payton, I believe is his name, Bill Payton, told me,
9 he said, you'll pay one way or the other.

10 Q. And that's after this?

11 A. That was after this.

12 Q. Subsequently, did you take the track hoe in for
13 service?

14 A. I did.

15 Q. Did you authorize Flint to put parts on it?

16 A. No, sir.

17 Q. Did you ask them to let you know before they put
18 any parts on it?

19 A. Yes, sir. I asked Mr. Payton to let me know what
20 was going on and I wanted to know how it was going on.

21 Q. Did you subsequently get a bill for parts put on?

22 A. I did.

23 Q. And what was your understanding of the part that
24 really fixed it?

25 A. Can I back up a second?

Bruce - Direct

1 Q. You can.

2 A. After the boom deal -- I been in the business
3 since 1992 and I clear land and the swing motor got caught
4 on fire. The swing motor got caught on fire. That's the
5 thing that makes it turn back this way.

6 We have a fire extinguisher and I keep a fire
7 extinguisher on the other things and he put it out
8 immediately. The only thing that I did was it burned a
9 hole in the air conditioning line going from the cab to
10 the compressor. Now, at this time, I had full insurance,
11 full insurance. Anything happen it was financed through
12 John Deere and anything -- if it had burnt to the ground,
13 I was insured for the loan.

14 Well, I carried it to Flint, they put the air
15 conditioning line on it, I charged it, and they charged me
16 \$3600 which I paid the bill. Really looking back on it it
17 should have been filed on my insurance, but I paid the
18 bill of \$3600.

19 Well, they assured me at this time that my
20 wiring harness, there's a main wiring harness on it that
21 comes out of the cab, runs along side of it and goes back
22 to the engine compartment. They assured me that it was
23 not affected. It's wrapped, it looks like it's wrapped in
24 black tape. The heat made the tape look like it had
25 shrunk, but Flint Equipment assured me my wiring harness

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1 was in good shape and never had a minutes problem with the
2 wiring harness. Well, on Thursday afternoon Justin called
3 me and said Jerry, the track hoe is going crazy, and I
4 said what, he said the track hoe -- when you touch the
5 lever, just touch it, to pick the boom up it done like
6 that and when you just touched it to put the boom back
7 down, it would hit the ground. It was like it was
8 connected to nothing.

9 So I carried it to Flint. I said I want you
10 to call me before you do anything. Friday they didn't
11 call. Monday they didn't call. I called them Monday at
12 lunch time and the man's exact words to me were,
13 Mr. Bruce, before we got your machine diagnosed it fixed
14 itself. And I said what did y'all do? Leave the tool box
15 out there. It might need several parts. I said how are
16 you going to know what to do with it.

17 THE COURT: That's what you do when you get a
18 back hoe with a thumb on it.

19 THE WITNESS: He said we'll know what to do
20 to it. So then the next day I called them back and they
21 said it's the main controller valve and I said are you
22 sure? He said, I'm sure. Well, they put the controller
23 valve on it and it didn't help it a bit. Then they said
24 well we think it's in the wiring harness that assured me
25 was in perfect shape. So they worked on it three days.

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1 Then they called John Deere in and John Deere
2 has a track hoe that has two knobs, joysticks they are
3 called, and everything. The one on the right side, the
4 boom comes up. You push it down the comes down. Push it
5 to the right and it's a perfect cross. Push it to the
6 right the bucket will open, push it to the left and the
7 bucket will close. On this side you got your swing on the
8 right and left and a boom in and out. So they swapped the
9 joystick, they swapped the hydraulic lines. That what the
10 mechanic told me.

11 When they swapped the hydraulic lines, the
12 swing went crazy. It was the controller value under the
13 right hand joystick. It costs three hundred and something
14 dollars. The only thing that I authorized them to do
15 because the guy asked me and said I would recommend a four
16 thousand hour service on the machine. I said, okay, tell
17 me what a four thousand hour service is. He said we drain
18 and change every drop of oil on this machine. The tract
19 motor oil gets changed, the swing motors oil gets changed,
20 all the hydraulic fluid, and I think it holds about 60
21 gallons gets drained and we put new everything in it and
22 new filters everywhere and that was \$2800 and I said okay
23 let's do that because that's what they recommend to me.

24 So I authorized the \$2800 but when they got
25 through they sent me a bill for almost \$9000 an I told

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1 them at the time I said I'm not paying for y'all guess
2 work and I'm not paying for y'all milking the clock
3 because the service man had already told me that you'll
4 pay one way or the other.

5 Q. And I believe your complaint is about padding the
6 bill and just putting parts on it?

7 A. If my wire harness was in the perfect order
8 before and it hadn't been touched, it was still in perfect
9 order and they found no fault in the wiring harness even
10 though they worked on it three days.

11 Q. Did you pay the \$2800?

12 A. I did.d

13 Q. Now, you're in dispute with Flint about the rest
14 of the bill?

15 A. Yes, sir.

16 Q. You had a Power Plan Credit agreement. Were you
17 aware of that time even though you had it that Flint could
18 charge your John Deere Power Plan?

19 A. No, sir, I've never heard of such a thing.

20 Q. Okay, we'll go over it. In this highlighted
21 portion it allows them without your signature to charge
22 your Power Plan.

23 A. Yes, sir

24 MR. BANNISTER: I'd like to have this marked.

25 (Agreement marked as Defendant's No. 2 for

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1 identification and admitted into evidence.)

2 BY MR. BANNISTER:

3 Q. I'll publish only a part of it. "You, being J.
4 Bruce, authorize FPC to honor any purchase you make by
5 mail, telephone, internet, facsimile transmission, and or
6 electronic message on your account. You agree your
7 signature is not necessary as authorization in such cases.
8 You agree that any authorization use of your account or
9 card constitutes your acceptance of the terms and
10 conditions of this agreement."

11 Mr. Bruce, did you do authorize Flint to do any
12 of those things to your John Deere credit?

13 A. No, sir. I didn't know I had a credit plan other
14 than when John Deere -- I bought the hoe, John Deere
15 financed it. And one reason I bought it from John Deere
16 is because they had a true zero percent interest. In
17 other words, I bought it at \$100,000 from John Deere and I
18 only paid back \$100,000. Now, Komonso, they said they had
19 free interest. If you bought the hoe, it was \$150,000 you
20 paid for it, if you took the free interest, it was
21 \$161,000. I said that's \$11,000 interest to me. So it
22 was a true zero percent interest.

23 THE COURT: Komonso, where are the?

24 THE WITNESS: I'm not sure.

25 MR. BANNISTER: It's a Japanese company.

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1 BY MR. BANNISTER:

2 Q. After your disagreement with Flint and you paid
3 Flint part of the bill you got sued by John Deere on money
4 that John Deere paid Flint on this disputed bill; is that
5 correct?

6 A. Yes, sir. It's my understanding that John Deere
7 sent Flint a check for parts and anything that they had
8 done, and then John Deere sued me.

9 Q. Now, you had to hire an attorney to defend you?

10 A. I did.

11 MR. BANNISTER: Your Honor, I submit a
12 attorney's fee affidavit under the Unfair Trade Practices
13 Act and we have a claim for attorney's fees.

14 THE COURT: Have they seen it?

15 MR. BANNISTER: No, I'm going to hand them
16 the copy.

17 (Affidavit of attorney's fees marked as
18 Defendant's Exhibit No. 3 for identification and admitted
19 into evidence.)

20 Alright, Mr. Bruce, answer any questions
21 Mr. Moore has.

22 CROSS-EXAMINATION

23 BY MR. MOORE:

24 Q. Mr. Bruce, when did you purchase the track hoe?

25 A. 2005.

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1 Q. You said you purchased it from Flint Equipment
2 Company?

3 A. I purchased it from John Deere. It may have been
4 Vanlot then.

5 Q. Is this a copy of the invoice where you purchased
6 that piece of equipment?

7 A. Yes, sir.

8 Q. Who is that invoice from?

9 A. Vanlot.

10 Q. So you did not purchase it from Flint Equipment
11 Company?

12 A. I purchased it from the John Deere ---

13 Q. But from Vanlot?

14 A. Yes, sir.

15 MR. MOORE: I'd like to put this in.

16 MR. BANNISTER: Your Honor, I don't believe
17 he is allowed to put anything in on a damaged hearing.

18 MR. MOORE: I'm allowed to impeach his
19 testimony.

20 MR. BANNISTER: But not to use that ---

21 THE COURT: Can't put it into evidence but
22 you can examine him.

23 BY MR. MOORE:

24 Q. You purchased it from Vanlot?

25 A. Yes, sir.

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1 Q. And you testified you had problems with the boom
2 back then and you actually filed suit. Did you file suit
3 against Vanlot or Flint Equipment Company?

4 A. Whatever my attorney filed, I'm not sure. It
5 could have been Vanlot, but the service manager was there.

6 Q. It was Vanlot as best as you can remember?

7 A. It was Flint Equipment Company that put it in to
8 have it fixed.

9 Q. This last time?

10 A. No, with the boom. It wasn't Vanlot. I'd had
11 the machine for a while. If you could tell me when Flint
12 took over.

13 THE COURT: Did you take it to the same
14 people at the same building?

15 THE WITNESS: Yes, sir.

16 BY MR. MOORE:

17 Q. Was it before or after July 14, 2008?

18 A. I couldn't tell you.

19 Q. That's when Flint Equipment Company bought ---

20 A. Okay. It was after July the 8th of 2008 then.
21 It was still under warrantee.

22 Q. The repair that's the subject of your claim
23 against Flint Equipment Company?

24 A. Yes, sir.

25 Q. I believe you testified you took the equipment in

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1 on May of 2010?

2 A. Whatever the date is, I'm not sure exactly the
3 date.

4 Q. I'm not allowed to put in any evidence, but I'll
5 hand you an invoice and just for the purpose of refreshing
6 your memory it says that the equipment was May 28, 2010.

7 A. February 28, '06.

8 Q. That's the warrantee date.

9 A. Okay.

10 Q. Here is the date of repair. Check machine all
11 functions are jerky and boom drops with no control, isn't
12 that what you said?

13 A. That's exactly what I said happened.

14 Q. So it was May 28, 2010 that you took the machine
15 in?

16 A. Yes, sir.

17 Q. I believe you testified that prior to that -- let
18 me hand you another document. Is that your signature on
19 this John Deere credit application dated June 7, 2010?

20 A. It is.

21 Q. Did you fill out that credit application in
22 connection with the repair that was performed in May of
23 2010?

24 A. Yes.

25 Q. When you testified earlier that you didn't file a

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1 credit application and that you didn't authorize Flint to
2 bill your account, wasn't this credit application filed in
3 connection with that repair?

4 A. That I couldn't tell you. Show me on here where
5 it shows that?

6 Q. But you just testified that you signed it then in
7 connection with this repair, didn't you?

8 A. I signed and dated -- yes.

9 Q. When you got, when you finally picked it up, was
10 it fixed?

11 A. Yes, sir.

12 Q. It was no long experiencing the problems.

13 A. No, sir.

14 Q. And you were presented with a copy of this
15 invoice?

16 A. I was.

17 Q. Did you dispute the invoice?

18 A. I immediately disputed it.

19 Q. Did you subsequently pay John Deere Power Plan
20 the \$2500 for the service?

21 A. I did because I authorized it.

22 Q. And I believe you filed a credit dispute at the
23 same time, didn't you, with the John Deere Power Plan?

24 A. I don't know if I filed a credit dispute. I
25 disputed the bill.

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1 Q. In that dispute, you acknowledged that you owed
2 the bill for the service?

3 A. I did for the four thousand hour service.

4 Q. And also you acknowledge that you delivered the
5 equipment to Flint because it was experiencing problems
6 and that they repaired it?

7 A. I did.

8 Q. I think you also acknowledge that you owed --
9 agreed to pay Flint for the cost of diagnosing and
10 replacing the control valve?

11 A. No, sir, I did not. I asked the man to put my
12 control valve -- let me back up again. Mr. Payton at
13 Flint Equipment not long after my equipment went out of
14 warranty, code come up on the machine. All the new
15 machines are computerized and it showed the injector pump
16 was giving problems. I called Mr. Payton at Flint
17 Equipment. When you take the injection pump all of a
18 diesel engine, it's the same thing is a distributor on a
19 car. It's got to be in time with the engine or when you
20 put it back on, it won't run.

21 I called Mr. Payton at Flint Equipment and
22 asked him how you pin this injection pump and he told me
23 that's privileged information. He said you have to buy a
24 service manual and if they pulled their records up from
25 Flint Equipment, I went and bought a service manual. I

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1 believe it costs \$168 but it didn't show you how to pin
2 the injector pump.

3 So I called Flint Equipment in Asheville,
4 North Carolina. Same company, different service manager
5 and I asked the service manager in Asheville. I said can
6 you walk me through pinning this injection pump and he
7 said I'll be glad to and he told me exactly how to do it
8 and he said I'll tell you what Mr. Bruce, he says have
9 your mechanic call me when he gets over to the machine.
10 You got to have a special pin to pin this with. And he
11 said I'll walk him through this step by step so there
12 won't be any problem taking this injection pump off. He
13 was as nice to me as anybody could ever be.

14 My mechanic called him he walked him through
15 this. Mr. Payton told me this was privileged information
16 and he couldn't help me at all.

17 But anyway when he called me back -- I called
18 him, he didn't call me. I asked him, I said how are you
19 going to know what to do? He said, he'll know and he put
20 a controller valve on it. Did not help my machine at all.
21 I said why you putting parts on it that won't help. I
22 said put my controller valve back on.

23 Then he said we think it's in the wiring
24 harness. The same wiring harness that they assured me was
25 in excellent condition when I had full insurance, full

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1 everything on the machine. They worked on it for three
2 days at shop rate. And then it didn't help it. When they
3 put the controller valve under the joy stick, just like
4 that it fixed it. Then they tried to say, well,
5 everything that we did helped it a little bit. It's like
6 having a flat tire, you can drive it on the rim but when
7 you put the one that ain't flat on there it won't help it.

8 Q. Let's back up a little bit.

9 THE COURT: I missed that analogy, but go
10 ahead.

11 BY MR. MOORE:

12 Q. Let's back up a minute to the wiring harness
13 issue. Was that before or after the boom issue?

14 A. That was the boom issue.

15 Q. How long before the boom issue?

16 A. I'm not sure.

17 Q. So in 2006 when you had the wiring harness
18 problem, you took the machine to Vanlot; is that correct?

19 A. Yes.

20 Q. Is this -- to refresh your memory, is this a copy
21 of the dispute summary form that you filled out when you
22 disputed this claim?

23 A. The boom?

24 Q. The one that's the subject of this lawsuit?

25 A. Yes, sir.

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1 Q. It basically says what you just said, isn't that
2 correct?

3 A. Yes, sir.

4 Q. And it acknowledge that the machine was fixed and
5 that you acknowledge that you owed the \$2850 and the cost
6 of the valve?

7 A. No, sir. This is not mine, this does not have my
8 signature on it.

9 Q. But isn't this what you filed with Power Plan?

10 A. I filed that I authorized the twenty-eight
11 hundred hour service or the four thousand hour service for
12 the \$2800 or whatever it was and I paid that because I did
13 authorize it.

14 Q. What is John Deere Financial FSB suing you for?
15 They suing you for the balance owed on your credit?

16 A. Yes, sir. They have lowered my credit line. I
17 had perfect credit with them until this point. I had good
18 enough credit that they just sign me up for \$100,000.

19 Q. Was that the credit line you applied for on June
20 7, 2010 that we're talking about, the one I showed you
21 before?

22 A. It's through the same company, yes.

23 Q. And are you denying that you owe them the money?

24 A. Yes, sir, I am.

25 Q. Have you paid them anything other than the \$2800?

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1 A. No, sir.

2 THE COURT: I thought you said you paid for
3 the controller.

4 THE WITNESS: I paid them for the control
5 valve and four thousand hour service.

6 THE COURT: And the control valve was three
7 hundred and something?

8 THE WITNESS: Yes, sir.

9 THE COURT: Is that included in the bill?

10 MR. BANNISTER: It's excluded from the suit
11 of John Deere brought against Mr. Bruce.

12 THE WITNESS: They only suing me for the
13 balance.

14 BY MR. MOORE:

15 Q. You paid that to John Deere credit and not to
16 Flint; is that correct?

17 A. I paid it to whoever sent the bill because I
18 authorized it.

19 MR. MOORE: I don't have any further
20 questions for Mr. Bruce.

21 THE COURT: Mr. Allen.

22 BY MR. ALLEN:

23 Q. Mr. Bruce, I'm Craig Allen and I represent the
24 plaintiff John Deere Financial in this action and I just
25 have a couple of questions. You brought this machine into

Deere vs. Bruce

1 Flint Equipment sometime in May; is that correct?

2 A. Yes, whatever the date is.

3 Q. You signed the credit application for the John
4 Deere Power Plan Credit Agreement on June 7 of 2010; is
5 that right?

6 A. Yes, sir, that's what it says.

7 Q. And that is your signature on that agreement?

8 A. Yes.

9 Q. Now, at that point in time, had the machine been
10 returned to you or was it returned to you at that time?

11 A. I went and picked it up. I carried it and
12 delivered it and picked it up.

13 Q. Did you sign that credit agreement at the time
14 you picked it up?

15 A. No, sir.

16 Q. Did you sign the agreement before you picked it
17 up?

18 A. After looking at this, which I don't have my
19 glasses on, I don't believe this to be my signature ---

20 THE COURT: Well, wait a minute, I thought
21 you just acknowledged that was your signature.

22 THE WITNESS: It looks like your signature.

23 THE COURT: Whose got your glasses?

24 THE WITNESS: Can I borrow your pen?

25 THE COURT: We're getting your glasses.

Deere vs. Bruce

1 Don't write ---

2 MR. MOORE: I have copies.

3 MR. BANNISTER: The default is acknowledged
4 unauthorized charges on the bill.

5 THE COURT: I got you.

6 THE WITNESS: Now, that I've got my glasses
7 on, this is not my signature.

8 BY MR. ALLEN:

9 Q. Let me ask you this, did you apply for the John
10 Deere Power Plan? Did you think you were signing up for
11 that?

12 A. They may have faxed something to my secretary,
13 but I did not sign this.

14 THE COURT: Well, is that your secretary's
15 handwriting?

16 THE WITNESS: That's my secretary's
17 handwriting right here.

18 THE COURT: Does she have the authority to
19 sign your name?

20 THE WITNESS: No, sir.

21 BY MR. ALLEN:

22 Q. You just signed something. Where is that?

23 A. Right there. Pretty close, isn't it?

24 Q. Yes, sir, it certainly is. How come you're so
25 sure that your signature on this agreement is not the same

Deere vs. Bruce

1 as your signature here or -- let me rephrase that. How
2 are you so sure that the signature on this agreement is
3 not your signature?

4 A. I don't believe it to be mine.

5 Q. It could be yours?

6 A. It could be mine. Let's go that route.

7 THE COURT: Let me just ask you this, you
8 used the credit Power Plan, right?

9 THE WITNESS: Yes.

10 BY MR. ALLEN:

11 Q. And you did pay approximately \$2800 to John Deere
12 because of authorized charges on that Power Plan?

13 A. Yes, sir, I did.

14 THE COURT: The Power Plan is not in dispute?

15 MR. ALLEN: As far as I'm concerned it is
16 not.

17 BY MR. ALLEN:

18 Q. You took your equipment there to Flint, you left
19 it there for them to check it out, repair it, what?

20 A. Yes, sir, to tell me what was wrong with it.

21 Q. You did authorize them to place charges on your
22 John Deere Power Plan?

23 A. Yes, sir.

24 MR. ALLEN: That's all I have. Thank you.

25 REDIRECT EXAMINATION

Deere vs. Bruce

1 BY MR. BANNISTER:

2 Q. Mr. Bruce, you did not authorize Flint to charge
3 the other \$7000 - odd dollar of parts?

4 A. No, I did not.

5 MR. MOORE: I object to the form, Your Honor.
6 Leading.

7 THE COURT: Well, let me ask you, was it
8 seven thousand some odd in parts or was it \$6476.90?

9 MR. BANNISTER: \$6476.90.

10 BY MR. BANNISTER:

11 Q. Did you authorize them to charge that?

12 A. No, sir.

13 MR. BANNISTER: That's all.

14 THE COURT: Do you go anything else?

15 MR. MOORE: Your Honor, where's the \$6476.90?

16 THE COURT: It's on Exhibit No. 1.

17 MR. BANNISTER: That's the damage sheet.

18 MR. MOORE: This is the one where he says the
19 actual damages were \$6476.90 but ---

20 THE COURT: Yeah, and 20% attorneys fees, the
21 total claim \$7772.28.

22 MR. MOORE: Then I need to clarify that, Your
23 Honor.

24 RECROSS-EXAMINATION

25 BY MR. MOORE:

Deere vs. Bruce

1 Q. This is the invoice that you say was giving to
2 you when you picked your machine up.

3 A. No, I didn't pick my machine up. I was never
4 given an invoice.

5 THE COURT: What?

6 THE WITNESS: I didn't pick it up. My driver
7 just went and picked it up. He wasn't given any paperwork
8 what so ever.

9 BY MR. MOORE:

10 Q. You testified earlier that you received a copy of
11 this invoice.

12 A. Through the mail.

13 Q. And what is the parts total showing on the
14 invoice? I'm just trying to clarify?

15 A. Parts of \$4000, labor is \$3700.

16 Q. Which includes the entire bill?

17 A. Yes.

18 Q. And when your machine ---

19 A. \$9840.

20 Q. When your machine was picked up, it was working,
21 correct?

22 A. Yes, sir.

23 THE COURT: What? Wait a minute, \$4000 plus
24 \$3700 equals \$8649.40?

25 MR. MOORE: It was taxes and finance fees and

Deere vs. Bruce

1 Your Honor, he paid some of that.

2 THE WITNESS: I paid what I authorized.

3 BY MR. MOORE:

4 Q. But is that broken down on the invoice?

5 A. No, sir.

6 Q. How did you know?

7 A. Because I know what he priced it to me. I asked
8 him up front what it would cost and he told me.

9 MR. MOORE: I don't have any more questions.

10 THE COURT: Well, the difference between
11 \$8698.40 and \$6476.90 is \$2221.50.

12 THE WITNESS: Well, they made an interest to
13 it?

14 THE COURT: Well, I thought you paid \$2800.

15 THE WITNESS: I paid \$2000 and then I paid
16 \$850.

17 THE COURT: The numbers aren't adding up.
18 It's like Korean mathematics. I'm sorry I don't mean to
19 be -- just trying to be funny. How come the numbers don't
20 add up, Mr. Bannister?

21 MR. BANNISTER: The number I gave you are
22 what Allen sued us for.

23 THE COURT: So it's John Deere's fault.
24 Okay.

25 MR. ALLEN: I'll accept that.

Deere vs. Bruce

1 MR. BANNISTER: Whatever they sued us for is
2 what they are trying to recover.

3 MR. ALLEN: Your Honor, there's a statement
4 of account attached to our complaint which lists the
5 original invoices of \$8698.40. There were a couple of
6 more parts. There was the \$2000 credit for the payment
7 made.

8 THE COURT: \$2000 credit?

9 MR. ALLEN: \$2000 first which was credited it
10 looks like August of 2010 brought the total down to
11 \$6949.87. There was some late fees, there was some
12 interest, there was a deduct of the late fee and the
13 interest. Then there was the \$850 credit that Mr. Bruce
14 paid. That brought the new balance down to \$6099.87.
15 Then there's interest, additional late fees interest,
16 which brings us to the balance due at the time of
17 \$6426.90.

18 THE COURT: 2690 or 7690?

19 MR. MOORE: The statement shows 2690.

20 THE COURT: So there's been a transposition
21 here.

22 MR. BANNISTER: I have to go by what he says
23 he was sued for.

24 THE WITNESS: The \$2800 that was paid was
25 paid in the time period that they allotted me. I paid for

Deere vs. Bruce

1 the four thousand hour service which was \$2000 and then
2 the controller value which goes under the joystick was
3 three hundred and something dollars. To put it on and the
4 diagnose that was \$850 is what I was told and that's where
5 I come up with the amount that I sent them. I paid them
6 for the service, the part under the joystick, putting it
7 on and diagnosing it.

8 THE COURT: Okay.

9 MR. BANNISTER: We have one more witness.

10 THE CLERK: Place your left hand on the Bible
11 and raise your right hand.

12 FRANKLIN DELANO MCCLEARAN, having been duly
13 sworn, testified as follows:

14 DIRECT EXAMINATION

15 BY MR. BANNISTER:

16 Q. Sir, what business are you in?

17 A. General construction.

18 Q. Have you ever purchased any equipment from Flint
19 Equipment Company?

20 A. Yes, sir.

21 Q. What?

22 A. New John Deere track hoe 2000.

23 Q. Have you also purchased other equipment?

24 A. Yes, sir. I bought a Kabelco(ph) and I paid
25 \$25,000 for it.

Deere vs. Bruce

1 Q. Did you have problems with it?

2 A. Yes, sir.

3 Q. What did you do with it when you had problems?

4 A. Called the people over at John Deere.

5 Q. Flint Equipment Company?

6 A. Yes, sir.

7 Q. Did they come out?

8 A. Yes, sir.

9 Q. Did they put parts on your equipment that did not
10 in any way ---

11 A. First there were two people out there and they
12 worked on it for several hours and didn't get it fixed.
13 The next day they came out and the service people came
14 with the mechanics and they stayed to about 3:00 and said
15 the machine was fixed. I was able to drive it out the
16 gate and I was on the machine and cranked the machine up
17 and it did the same thing that what we had called them out
18 for. So we loaded it up and took it to the shop and they
19 kept it there for about a week and called us and told us
20 it was ready to go.

21 We went and picked it up and brought it home
22 and it did the same thing that it had did before. The
23 turbo was burnt up on it and that was the problem all
24 along. So when we got the turbo put on it and the machine
25 started running like it was supposed to and I got a bill

Deere vs. Bruce

1 for about \$8000 or \$9000.

2 Q. I'm going to show you this document and ask you
3 if you recognize that?

4 A. Yes, sir, this is my bill.

5 Q. Is that the bill you got from Flint Equipment
6 Company?

7 A. Yes, sir. And I questioned them about this bill
8 and it didn't help the machine at all.

9 Q. Is it your opinion that they padded the bill by
10 putting parts on there?

11 A. Well, there was stuff on there that it definitely
12 didn't need. All it needed was a turbo.

13 MR. BANNISTER: I'd like to mark this, Your
14 Honor.

15 (Bill marked for identification as
16 Defendant's Exhibit 4 for identification and admitted into
17 evidence.)

18 BY MR. BANNISTER:

19 Q. Did you protest to Flint Equipment Company?

20 A. Yes, sir, I set up for a meeting. Jerry was
21 there, I was there and my sons were there because they run
22 the equipment and before the meeting was over I believe it
23 was the vice president of John Deere or Flint and he done
24 some figuring work on the bill and asked me would I pay
25 \$2548.22, would I agree to pay that and I told him yes,

Deere vs. Bruce

1 sir, I would. I wrote him a check and that cleaned up my
2 bill and then we went and bought a new turbo and put it on
3 our machine and got it back operating.

4 Q. You got a padded bill from Flint?

5 A. Yes, sir.

6 Q. Parts that you didn't need?

7 A. Well, it didn't help. It didn't do nothing for
8 my machine.

9 MR. BANNISTER: That's all I have.

10 CROSS-EXAMINATION

11 BY MR. MOORE:

12 Q. What's your relationship to Mr. Bruce?

13 A. Just knowing him -- actually Mr. Bruce
14 recommended me to Flint.

15 Q. You say you bought the new track hoe in 2000, did
16 you by that from Vanlot?

17 A. I didn't bought it in 2000.

18 Q. I misunderstood, when did you buy it?

19 A. Probably in 2010 or '11.

20 Q. The other machine, when did you buy it?

21 A. I bought it probably -- I'll tell you the truth I
22 don't remember. It was in the summertime when I bought
23 it.

24 Q. Was it new?

25 A. No, it was used. I bought it and paid \$25,000

Deere vs. Bruce

1 for it.

2 Q. Mr. Bruce attended that meeting with you?

3 A. That is correct.

4 Q. To dispute that bill, is that correct?

5 A. Yes.

6 Q. What was his purpose for going to that meeting?

7 A. To try to straighten his out.

8 Q. They resolved your bill; that correct?

9 A. I resolved me, yes.

10 Q. To your satisfaction?

11 A. That's correct.

12 Q. Did you ever accuse Flint of charging --- do you
13 have a Power Plan account?

14 A. I've got an unlimited account.

15 Q. I mean, do you have a Power Plan account John
16 Deere?

17 A. No.

18 Q. Did you ever accuse Flint or think that Flint
19 charged something to your charge accounts without your
20 authorization? You've heard Mr. Bruce testify.

21 A. I heard what Mr. Bruce said. My situation is
22 different than Mr. Bruce. My situation is when I take a
23 piece of equipment in, I'm going to pay for what was the
24 problem. The problem was none of the stuff that Flint
25 done for it.

Deere vs. Bruce

1 Q. My question is and I think you answered it is you
2 don't have an allegation that Flint mischarged your ---

3 A. Well, they gave me a four thousand and some
4 dollar credit.

5 Q. They didn't charge a credit account of yours and
6 you ended up paying the money and then pay somebody else;
7 is that correct? You paid your bill.

8 A. I paid my bill. We came to an agreement in that
9 meeting. They deducted four thousand and some odd dollars
10 off my bill. And right after the service manager left
11 there and the mechanic that worked on the machine left
12 there. I don't know if they got fired or what but I know
13 the service manager there I bought the turbo from him.

14 MR. MOORE: No further questions.

15 MR. ALLEN: Nothing further.

16 REDIRECT EXAMINATION

17 BY MR. BANNISTER:

18 Q. So if I understood your testimony correctly, you
19 disputed the bill, Flint didn't have a credit plan where
20 they could just charge it over and get their money from
21 John Deere and then have John Deere sued?

22 A. No, sir.

23 MR. BANNISTER: That's all I have.

24 THE COURT: Is he your lawyer?

25 Mr. Bannister?

Deere vs. Bruce

1 THE WITNESS: No, sir.

2 THE COURT: Who was your lawyer?

3 THE WITNESS: Nobody. I just witnessed it
4 for him. Jerry and I -- Jerry was the one who caused me
5 to buy it.

6 THE COURT: Clement used to be your lawyer,
7 Ronnie Clement?

8 THE WITNESS: Yes. He handled a couple of
9 your situations.

10 THE COURT: Well, not me, but I wanted to
11 disclose it. Clement and I owned a building together and
12 he was a client of Clement's and I never gained any
13 benefit from --- I never represented you, did I?

14 THE WITNESS: No, sir.

15 THE COURT: Anything else? You can step
16 down.

17 MR. BANNISTER: Your Honor, I presented an
18 attorney fee affidavit and I'd be happy if you want to
19 listen to me about that.

20 THE COURT: You want me to put him on the
21 witness stand?

22 MR. MOORE: No, Your Honor, I'd just like to
23 glance over it for a moment.

24 THE COURT: I'd love to get him up here under
25 oath up here.

Deere vs. Bruce

1 MR. MOORE: I have no questions in regards to
2 the affidavit.

3 MR. BANNISTER: That would be out case.

4 THE COURT: Have you been paid yet?

5 MR. ALLEN: Your Honor, we've only been paid
6 \$2850.

7 THE COURT: Okay.

8 MR. MOORE: Our argument would be he's failed
9 to establish the Unfair Trade Practices because he's sued
10 for us applying charges to the credit account. The
11 complaint then alleged having him billed and the evidence
12 that provided from the second witness ---

13 THE COURT: That would be great by the
14 judgment is already entered and it's just the amount. So
15 I'll give it \$7772.28 plus the attorney's fees.

16 MR. BANNISTER: Thank you, Your Honor.

17 THE COURT: Mr. Bannister, prepare a formal
18 order and submit it to opposing counsel and then forward
19 it to me.

20 MR. BANNISTER: Thank you, Your Honor.

21 ---END OF TRANSCRIPT RECORD---

22

23

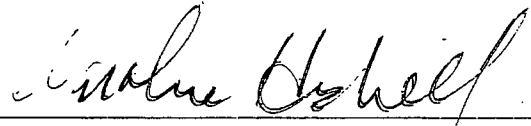
24

25

Deere vs. Bruce

1 I, the undersigned Caroline Hiskell, Official
2 Court Reporter for the Thirteenth Judicial Circuit of the
3 State of South Carolina, do hereby certify that the
4 foregoing is a true, accurate, and complete transcript of
5 record of all the proceedings had and evidence introduced
6 in the trial of the captioned case, relative to appeal, in
7 the Court of Common Pleas, Greenville, South Carolina on
8 the 13th day of July, 2013.

9 I do further certify that I am neither of
10 kin, counsel, nor interest to any party hereto.

11
12 
13

14 Caroline Hiskell
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STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

John Deere Financial, f.s.b., f/k/a
FPC Financial, f.s.b.,

Plaintiff,

vs.

Jerry A. Bruce,

Defendant,

AND

Jerry A. Bruce,

Third-Party Plaintiff,

vs.

Flint Equipment Co.,

Third-Party Defendant.

IN THE COURT OF COMMON PLEAS

THIRTEENTH JUDICIAL CIRCUIT

CASE NUMBER: 2011-CP-23-7943

ATTORNEY FEE AFFIDAVIT

Affidavit of O. W. Bannister
in Support of Claim for Attorney Fees, Suit Money, and Costs

PERSONALLY appeared before me, O. W. Bannister, who says, after being duly sworn:

1. I was admitted to practice law in South Carolina in 1969. Since that time I have practiced law full-time in Greenville, South Carolina.

2. I have an AV rating in Martindale-Hubbell.

3. My normal fee is \$400 per hour, plus expenses to include filing fees, service of process, costs, depositions, and normal office costs, such as copying long-distance phone calls, and fax costs.

Further, deponent saith not.

SWORN TO before me this 2nd day
of July 20 13

Shirley Coker
NOTARY PUBLIC for South Carolina
My Commission Expires: 1-16-18

O. W. Bannister
O. W. Bannister

Detail Transaction File List
Bannister & Wyatt, LLC

	Client	Trans Date	Tmkr	H P	Tcode/ Task Code	Rate	Hours to Bill	Amount		Ref #
Fees										
	8174.0000	12/12/2011	6	P	20	350.00	0.50	175.00	Meeting with client; review complaint. Bruce/Jerry	15
	8174.0000	12/13/2011	6	P	23	350.00	0.50	175.00	Bruce vs. John Deere Preparation of Answer to Complaint; preparation of discovery to opposing party. Bruce/Jerry	16
	8174.0000	02/04/2012	6	P	23	350.00	0.25	87.50	Bruce vs. John Deere Preparation for hearing. Bruce/Jerry	29
	8174.0000	02/05/2012	6	P	8	350.00	1.25	437.50	Bruce vs. John Deere Attend hearing on motion to add additional party. Bruce/Jerry	30
	8174.0000	02/06/2012	6	P	23	350.00	2.25	787.50	Bruce vs. John Deere Preparation of Complaint, legal research, research Defendant Flint agent for service. Bruce/Jerry	31
	8174.0000	02/08/2012	6	P	1	350.00	0.75	262.50	Bruce vs. John Deere Filing and service of third party complaint. Bruce/Jerry	32
	8174.0000	02/16/2012	6	P	2	350.00	0.25	87.50	Bruce vs. John Deere Correspondence re: agree to extension and answer. Bruce/Jerry	17
	8174.0000	03/02/2012	6	P	1	350.00	0.50	175.00	Bruce vs. John Deere Review responses to Interrogatories; correspondence to client. Bruce/Jerry	18
	8174.0000	03/03/2012	6	P	1	350.00	0.25	87.50	Bruce vs. John Deere Review credit application. Bruce/Jerry	19
	8174.0000	03/29/2012	6	P	23	350.00	0.75	262.50	Bruce vs. John Deere Preparation and review of Requests to Admit. Bruce/Jerry	20
	8174.0000	05/01/2012	6	P	1	350.00	0.50	175.00	Bruce vs. John Deere Review Response to Requests to Admit. Bruce/Jerry	21
	8174.0000	06/20/2012	6	P	23	350.00	0.50	175.00	Bruce vs. John Deere Preparation of subpoena to Flint Equipment Company. Bruce/Jerry	23
	8174.0000	07/12/2012	6	P	1	350.00	0.50	175.00	Bruce vs. John Deere Review response to subpoena. Bruce/Jerry	24
	8174.0000	07/12/2012	6	P	2	350.00	0.25	87.50	Bruce vs. John Deere Correspondence to client. Bruce/Jerry	25
	8174.0000	09/20/2012	6	P	1	350.00	0.50	175.00	Bruce vs. John Deere Review additional responses to discovery. Bruce/Jerry	22
	8174.0000	11/01/2012	6	P	23	350.00	0.75	262.50	Bruce vs. John Deere Interview Frank McClear. Bruce/Jerry	26
	8174.0000	12/06/2012	6	P	23	350.00	0.75	262.50	Bruce vs. John Deere Preparation and filing of Motion to add Third Party. Bruce/Jerry	27
	8174.0000	12/11/2012	6	P	2	350.00	0.25	87.50	Bruce vs. John Deere Correspondence to client and opposing counsel re: hearing. Bruce/Jerry	28
	8174.0000	04/11/2013	6	P	23	350.00	0.50	175.00	Bruce vs. John Deere Preparation of Motion for Entry of Default. Bruce/Jerry	33
	8174.0000	04/19/2013	6	A	2	100.00	0.25	25.00	Bruce vs. John Deere Correspondence to client re: additional discovery. Bruce/Jerry	ARCH
	8174.0000	04/19/2013	17	A	9	100.00	0.25	25.00	Bruce vs. John Deere Transcription and processing of correspondence to client. Bruce/Jerry	ARCH
	8174.0000	05/01/2013	6	P	23	350.00	0.75	262.50	Bruce vs. John Deere Preparation of Order of Default. Bruce/Jerry	34
	8174.0000	06/04/2013	6	P	2	350.00	0.25	87.50	Bruce vs. John Deere Correspondence to CT Corp Systems, Registered Agent for Flint Equipment re: notice of default damages hearing. Bruce/Jerry	40
	8174.0000	06/12/2013	6	P	2	350.00	0.25	87.50	Bruce vs. John Deere Correspondence to client. Bruce/Jerry	39
									Bruce vs. John Deere	

Date: 07/09/2013

Detail Transaction File List Bannister & Wyatt, LLC

Page: 2

Client	Trans Date	Tmkr	H P	Tcode/ Task Code	Rate	Hours to Bill	Amount	Ref #
Fees								
8174.0000	06/17/2013	6	P	1	350.00	0.50	175.00	35
							Receipt and review of Motion to Set Aside Default. Bruce/Jerry	
8174.0000	06/19/2013	6	P	1	350.00	2.25	787.50	14
							Bruce vs. John Deere Review Motion; legal research. Bruce/Jerry	
8174.0000	06/28/2013	6	P	27	350.00	3.25	1,137.50	36
							Bruce vs. John Deere Legal research, preparation of response to motion, Bruce/Jerry	
8174.0000	07/01/2013	6	P	23	350.00	1.75	612.50	37
							Bruce vs. John Deere Continued preparation of Memorandum in Opposition to Motion to Set Aside Entry of Default. Bruce/Jerry	
8174.0000	07/02/2013	6	P	1	350.00	0.50	175.00	38
							Bruce vs. John Deere Review of Memorandum in Opposition to Motion to Set Aside Default; correspondence to Judge Miller. Bruce/Jerry	
8174.0000	07/09/2013	6	P	4	350.00	0.25	87.50	41
							Bruce vs. John Deere Phone conference with client. Bruce/Jerry	
8174.0000	07/10/2013	6	P	20	350.00	1.00	350.00	42
							Bruce vs. John Deere Meeting with client. Bruce/Jerry	
8174.0000	07/10/2013	6	P	8	350.00	0.50	175.00	43
							Bruce vs. John Deere Attend Hearing. Bruce/Jerry	
							Bruce vs. John Deere	
Total for Fees					Billable	23.50	8,191.20	
Advances								
8174.0000	06/26/2012	18	A	69			41.20	ARCH
							Witness Fee/Mileage Flint Equipment Co. Bruce/Jerry	
8174.0000	12/06/2012	6	A	55			25.00	ARCH
							Bruce vs. John Deere Filing fee Clerk of Court Bruce/Jerry	
8174.0000	05/20/2013	6	P	55			25.00	8
							Bruce vs. John Deere Filing fee Clerk of the Court of Common Pleas Bruce/Jerry	
							Bruce vs. John Deere	
Total for Advances					Billable	0.00	92.20	
GRAND TOTALS								
					Billable	23.50	8,191.20	

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS

John Deere Financial, f.s.b., fka FPC Financial,
f.s.b.,

Civil Action No.: 2011-CP-23-7943

Plaintiff,

vs.

Jerry A. Bruce,

Defendant

and

Jerry A. Bruce,

Third-Party Plaintiff,

vs.

Flint Equipment Co.,

Third Party Defendant

THIRD PARTY DEFENDANT'S MOTION
PURSUANT TO SCRCP RULE 59(e) TO
ALTER OR AMEND ORDER DENYING
THIRD PARTY DEFENDANT'S MOTION
TO SET ASIDE DEFAULT AND FOR
LEAVE TO FILE ANSWER

TO: O.W. Bannister, Esquire, Bannister & Wyatt, LLC, Attorney for Jerry A. Bruce,
Defendant/Third-Party Plaintiff

PLEASE TAKE NOTICE that the undersigned as attorney for Flint Equipment Co., the
Third Party Defendant in the above entitled action, hereby moves before the Honorable Edward W.
Miller, for an order, pursuant to SCRCP Rule 59(a) and (e), altering and/or amending the order of
the court denying the Third Party Defendant's Motion to Set Aside Default Judgment and For Leave
to File an Answer entered on July 11, 2013, a copy of which was received by the undersigned on
July 15, 2013, this motion is made on the following grounds:

(1) The Order of Default and Order Setting Damages Hearing in this matter dated May
28, 2013 and entered May 30, 2013, holds that the Defendant is in default but fails to enter default
judgment against the Defendant. As indicated by the order additional testimony on the issue of
damages was necessary for the court to enter a final judgment in this matter. The Order therefore
constituted an entry of default and did not constitute a final judgment within the meaning of SCRCP

Rule 60. "According to Rule 55(b)(1) S.C.R.Civ.P. 'If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages ... the court may conduct such hearings or order such references as it deems necessary and proper....'" This language indicates a court is unable to enter judgment until damages are determined. The entry of default is an official recognition of the failure to appear or otherwise respond, but is not a judgment by default.¹ See H. Lightsey, J. Flanagan, South Carolina Civil Procedure, 77 (2nd Ed.1985)" Ricks v. Weinrauch, 360 S.E. 2d 535, 293 S.C. 372 at 374 (S.C. App 1987). Accordingly, the "good cause shown" standard of SCRCR Rule 55(c) should have been applied by the Court in this matter instead of the stricter standard imposed by SCRCR Rule 60(b)(1) is the applicable standard which should be applied by the Court in this case. See Wham v. Shearson Lehman Brothers, Inc., 381 S.E.2d 499 (S.C. App. 1989).

The affidavit presented by the Third Party Defendant establishes that the Defendant acted to set aside the default almost immediately upon receipt of notice of the damages hearing in this action. The Third Party Defendant also attached a copy of its proposed answer to the motion for relief from default and established a meritorious defense to the claims asserted by the Defendant\Third Party Plaintiff.

(2) Public policy favors the trial of claims on their merits over the entry of judgment by default. See Columbia Pools, Inc. v. Galvin, 339 S.E. 2d 524, 288 S.C. 59 (SC App 1986), Micronics, Inc. v. South Carolina Department of Revenue, 548 S.E. 2d 223, 345 S.C. 506 (S.C. App 2001). Even if the stricter standard of SCRCR Rule 60(b)(1) is utilized by the Court, the affidavit submitted by the Third Party Defendant, the meritorious defense presented by the proposed answer and the lack of prejudice to the Defendant\Third Party Plaintiff², are sufficient to meet the stricter standard and justify the entry of an order setting aside the default and granting the Third Party

¹ The underlying action between the Plaintiff and Defendant\Third Party Plaintiff is still pending and has not been tried and no judgement has been entered against the Defendant\Third Party Plaintiff.

Defendant leave to file an answer in this matter.

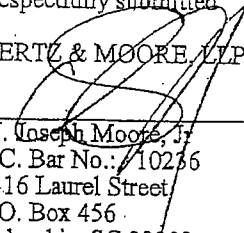
(2) As argued by counsel at the hearing on its motion, SCRCP Rule 14(a) required the Defendant\Third Party Plaintiff to obtain leave of the court before filing and serving the third party complaint in this action. The Defendant, however, filed and served the third party complaint seven (7) days before the entry of the order granting the Defendant leave to file and serve the third party complaint. An order is not final until it is written and entered. See: First Union National Bank vs. Hitman, Inc., 306 S.C. 327, 411 S. E. 2d 681 S.C. App. 1991). As a result of the failure by the Defendant to comply with the requirements of SCRCP Rule 14(a) the attempted service of the Third-Party Complaint prior to the entry of the order granting the Defendant leave to serve the pleading rendered the service void and ineffective. As a result the Third Party Defendant is not in default and the underlying judgment if any is void.

(3) The entry of the default judgement does not prohibit the Third Party Defendant from contesting the judgment on the grounds that the pleadings are defective, fail to state a claim upon which relief can be granted and/or do not comply with the requirements of the rules of civil procedure. See Mutual Savings and Loan Association v. McKenzie, 274 S.C. 639, 266 S.E. 2d 423 (1980). As argued by counsel for the Third Party Defendant at the hearing the Defendant\Third Party Plaintiff's complaint does not meet the requirements of Rule 14(a) because the claims are not based on secondary liability. Claims of fraud and unfair trade practices are not proper under Rule 14(a). See Beach v. Hudson, 298 S.C. 424 (S.C.App. 1989). Given that the third party complaint in this matter fails to comply with the requirements of Rule 14(a), the relief sought by the Defendant\Third Party Plaintiff should be denied.

For the foregoing reasons the undersigned respectfully request that the Court reconsider its order denying the Third Party Defendant's motion for relief from default and for leave to answer in this matter.

Respectfully submitted,

GERTZ & MOORE, LLP



W. Joseph Moore, Jr.
S.C. Bar No.: 10236
1416 Laurel Street
P.O. Box 456
Columbia, SC 29202
(803) 252-1524
Attorneys for the Third Party Defendant
Flint Equipment Co.

July 22, 2013

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO: 2011CP2307943

FILED IN THE COURT
OF GREENVILLE CO. S.C.
JUL 26 PM 12:54
JAN R. WICKENS

John Deere Financial Fsb vs. Jerry A Bruce

CHECK ONE:

- ☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other: _____
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(f) SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____
- ☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order; ☐ Statement of Judgment by the Court.

NOTICE

This is a notice to you that an Order Denying Flint Equipment Co.'s Dual Motion To Set Aside Default Judgment And Declare Default Judgment Void in this case has been filed in the Clerk of Court's Office. To obtain a certified copy, you may contact our office by phone (864) 467-8551 or email a request to bk Lukas@greenvillecounty.org. If you would like a copy via email, please provide a valid email address.

Dated at Greenville, South Carolina, this .

Court Reporter:

PRESIDING JUDGE -

Craig Horger Allen Craig H. Allen, P.A. P.O. Box
10854 Greenville, SC 29603

Oscar W. Bannister Bannister & Wyatt, LLC P.O.
Box 10007 Greenville, SC 29603
William Joseph Moore Jr. Gertz & Moore, LLP
P.O. Box 456 Columbia, SC 29202

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Paul B. Wickensimer Greenville County Clerk Of Court
- Clerk of Court

ENTERED COMPUTER

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

John Deere Financial, f.s.b., f/k/a
FPC Financial, f.s.b.,

Plaintiff,

vs.

Jerry A. Bruce,

Defendant,

AND

Jerry A. Bruce,

Third-Party Plaintiff,

vs.

Flint Equipment Co.,

Third-Party Defendant.

IN THE COURT OF COMMON PLEAS

THIRTEENTH JUDICIAL CIRCUIT

CASE NUMBER: 2011-CP-23-7943

ORDER

2013 JUL 25 PM 12:54

CLERK OF COURT
JERRY A. BRUCE
JERRY A. BRUCE
JERRY A. BRUCE

WLB

The above entitled matter came before the Court on July 10, 2013 on the dual motion of Flint Equipment Co. ("Flint") to (1) set aside a default judgment under Rule 55(c) and Rule 60(b)(1), S.C.R.C.P. and (2) declare the default judgment void pursuant to Rule 60(b)(4) and Rule 14(a), S.C.R.C.P.

After reviewing the records in this case, the affidavits and briefs submitted to the Court and hearing the arguments of counsel, the Court makes the following findings of fact and conclusions of law:

1. This Court has jurisdiction over the parties and the subject matter of this action.
2. The motion to set aside default judgment is denied.

This action began with the filing of a Complaint by John Deere Financial, f.s.b., FPC Financial, f.s.b. ("John Deere") on or about November 29, 2011. The essence of the Complaint

1


was that John Deere had honored the charge by Jerry Bruce ("Bruce") on a credit line for a certain amount. Pursuant to Bruce's agreement with John Deere, John Deere was entitled to recover the amount plus attorney fees.

Bruce timely filed an Answer and on December 6, 2012 Bruce moved to add Flint as a third party defendant pursuant to Rule 14(a), S.C.R.C.P. This matter was heard before the Honorable Leticia H. Verdin on February 5, 2013 and Judge Verdin orally ruled from the bench that Bruce could amend his pleadings and file a third party complaint against Flint.

On February 15, 2013, Judge Verdin filed a Form 4 Order confirming her earlier oral ruling.

On February 8, 2013, Bruce filed his Third Party Complaint against Flint and caused the same to be served by mail to C.T. Corporate Systems, the registered agent for Flint. On February 11, 2013, an agent for C.T. Corporate Systems signed the receipt of certified mail which was the Third Party Complaint against Flint.

Flint acknowledges this acceptance of service and the forwarding of the pleadings to its home office in Georgia where the pleadings were delivered but misplaced or lost.

On April 12, ²⁰¹³ 2013, Bruce filed an affidavit of default against Flint with the clerk of court. Eg

On May 30, 2013 the Honorable D. Garrison Hill filed an Order of Default and Order setting damages hearing although no specific damage hearing date was set. On June 4, 2013, Bruce notified Flint of the damages hearing for July 10, 2013. Flint promptly filed motions to set aside the default.

Initially Flint sought to have its motion for default determined by the less strict legal standard of Rule 55(c). Part of its argument for the lesser standard was that the Order of Judge Hill was not an order of default. This interpretation of Judge Hill's Order is misplaced. This

Court finds Judge Hill's Order was for default and therefore the more stringent requirements of Rule (60)(b)(1) must be applied.

The Court finds that Flint has not presented excusable neglect and therefore, good cause for setting aside the default. Flint acknowledges that it is aware of the serious^{NATURE} of lawsuits and pleadings in general. Flint further acknowledges that it has set up a system for reviewing legal pleadings. Flint further acknowledges that it has no knowledge of what happened to the Bruce Third Party Complaint once it was delivered to Flint's home office. As stated by Flint's attorney in open court, the pleading simply disappeared and had not been found. Em

It appears to the Court that the pleadings were properly delivered to the home office where personnel were trained to be aware of the seriousness of pleadings and those pleadings were simply lost or misdirected. Therefore, in the exercise of my discretion, I decline to relieve Flint of the default. Sundown v. Intedged Ind., 383 S.C. 601, 681 S.E.2d 885 (2009).

3. The motion to declare the default judgment void is denied.

Initially the Court is concerned over the appropriateness of using a Rule 14 motion to set aside a default judgment on a claim of lack of jurisdiction. Subject matter jurisdiction is the power of a court to hear and determine cases of a general class to which the proceedings in question belong. Dove v. Gold Kist, 314 S.C. 235, 442, S.E.2d 598 (1994). Certainly this Court can hear claims originating in fraud and unfair trade practices between Flint and Bruce.

Rule 14 is a procedural rule designed to control what claims can be heard in a particular proceeding. Allowing Flint to raise claims under Rule 14 after a default judgment would allow Flint to contest facts admitted or waived by its default and seems to run contrary to the requirements of Rule 12.

Even if Flint's Rule 14 motion is proper, the Court declines to set aside the default under

the exercise of its discretion. Bruce's claim that Flint charged his credit line for work he did not authorize is admitted by Flint's default and is certainly intertwined with John Deere's claim against Bruce.

For the above reasons, this Court declines to grant Flint's motion to set aside default.

AND IT IS SO ORDERED.



The Hon. Edward W. Miller
Judge, Thirteenth Judicial Circuit

Greenville, South Carolina

Date: 7/23/13

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE
IN THE COURT OF COMMON PLEAS

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NO. 2011 CP-23-7943

Jerry A. Bruce

Flint Equipment Company

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: O. W. Bannister

Attorney for: ☒ Plaintiff ☐ Defendant
or
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.

Additional Information for the Clerk :

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
Jerry A. Bruce	Flint Equipment Company	\$31,508.04
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

E. W. M. M. M.
Circuit Court Judge

2190
Judge Code

7/23/13
Date

For Clerk of Court Office Use Only

This judgment was entered on the 2 day of Aug, 20 13 and a copy mailed first class or placed in the appropriate attorney's box on this 2 day of Aug, 20 13 to attorneys of record or to parties (when appearing pro se) as follows:

O. W. Bannister

P. O. Box 10007

Greenville, SC 29601

ATTORNEY(S) FOR THE PLAINTIFF(S)

W. Joseph Moore, Jr.

P. O. Box 456

Columbia, SC 29202

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter:

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

John Deere Financial, f.s.b., f/k/a

FPC Financial, f.s.b.,

Plaintiff,

vs.

Jerry A. Bruce,

Defendant,

and

Jerry A. Bruce,

Third-Party
Plaintiff,

vs.

Flint Equipment Co.,

Third-Party
Defendant.

IN THE COURT OF COMMON PLEAS

THIRTEENTH JUDICIAL CIRCUIT

CASE NUMBER: 2011-CP-23-7943

**JUDGMENT AGAINST
FLINT EQUIPMENT COMPANY**

Verified

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENS
2013 AUG -2 3 A 10:39

This matter came before the Court after proper notice for a damage hearing on the claim that Flint Equipment Company (hereinafter "Flint") violated the Unfair Trade Practices Act, S.C. Code §39-5-10(a).

The facts admitted by Flint by its default are as follows:

Flint sales and services John Deere machinery out of its Simpsonville, SC location. Third Party Plaintiff Jerry A. Bruce (hereinafter "Bruce") purchased a John Deere track hoe and financed the same through John Deere Financial, f.s.b., f/k/a FPC Financial, f.s.b. (hereinafter "John Deere"). The equipment purchased by Bruce had mechanical problems which resulted in a previous legal difficulty between Flint and Bruce. Bruce prevailed and the Flint manager made comments after the proceeding that Bruce would pay one way or the other.

Subsequently Bruce experienced additional mechanical difficulties with the John Deere track hoe and delivered the same to Flint for repairs. While there, Bruce authorized a 400 hour

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service for which he paid.

Without authorization from Bruce, Flint replaced a number of parts on the John Deere track hoe in an attempt to fix the mechanical problem. Eventually the problem was fixed with a \$350 part.

Bruce had a line of credit with John Deere which did not require his signature for charges. Flint charged the disputed repairs and replacement parts on Bruce's credit line without his permission. Bruce contested these charges and eventually John Deere brought suit against Bruce for \$6,476.90 unpaid charges and twenty percent (20%) attorney fee in the amount of \$1,295.38 for a total of \$7,772.28.

At the hearing Bruce produced an additional witness who accused Flint of also padding his bill for the repair of his equipment with unnecessary parts and labor.

Bruce presented an attorney fee affidavit for attorney fees and costs incurred in the amount of \$8,191.20. Attorney fee charges were not challenged by Flint.

Padding bills and charging such bills on a customer's credit line is an unfair trade practice that affects the public's interest because of its potential for repetition. The Court finds Bruce is entitled to judgment against Flint in the amount of \$7,772.28.

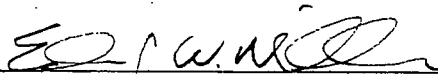
In the exercise of discretion, the Court will treble those damages to \$23,316.84.

The Court finds that an award of attorney fees is appropriate and Bruce is awarded an award of attorney fees of \$8,191.20 for a total judgment of \$31,508.04.

IT IS SO ORDERED.

Greenville, South Carolina

Date: 7/23/13


The Hon. Edward W. Miller,
Judge, Thirteenth Judicial Circuit

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

John Deere Financial, f.s.b., fka FPC
Financial, f.s.b.,

Plaintiff,

vs.

Jerry A. Bruce,

Defendant

and

Jerry A. Bruce,

Third-Party Plaintiff,

vs.

Flint Equipment Co.,

Third Party Defendant

IN THE COURT OF COMMON PLEAS

Civil Action No.: 2011-CP-23-7943

THIRD PARTY DEFENDANT'S
AMENDED MOTION AND
MEMORANDUM PURSUANT TO SCRCF
RULE 59(e) TO ALTER OR AMEND THE
ORDER DENYING
THIRD PARTY DEFENDANT'S MOTION
TO SET ASIDE DEFAULT AND FOR
LEAVE TO FILE ANSWER

TO: O.W. Bannister, Esquire, Bannister & Wyatt, LLC, Attorney for Jerry A. Bruce,
Defendant\Third-Party Plaintiff

PLEASE TAKE NOTICE that the undersigned as attorney for Flint Equipment Co., ("Flint") the Third Party Defendant in the above entitled action, hereby moves before the Honorable Edward W. Miller, for an order, pursuant to S.C.R.C.P. Rule 59(a) and (e), altering and/or amending the Form 4 order of the court denying the Third Party Defendant's Motion to Set Aside Default Judgment and For Leave to File an Answer entered on July 11, 2013, a copy of which was received by the undersigned on July 15, 2013, and the formal order filed July 25,

2013 and received by the undersigned by email on July 29, 2013. This Motion is amended to respond to the written Court Order filed on July 26, 2013 and is made on the following grounds:

I. Relief Is Appropriate Under the "Good Cause" Standard of S.C.R.C.P. Rule 55(c).

The Order of Default and Order Setting Damages Hearing in this matter dated May 28, 2013 and entered May 30, 2013, holds that the Defendant is in default but fails to enter default judgment against the Defendant. As indicated by the Order additional testimony on the issue of damages was necessary for the court to enter a final judgment in this matter. The procedural stages of default entail "at least two and sometimes three separate steps: (1) the entry of default (2) the discretionary hearing before entry of judgment and (3) the actual entry of judgment," J. Flanagan, South Carolina Civil Procedure (3rd Ed. 2010) at 451. As explained by the Court of Appeals:

According to Rule 55(b)(1) S.C.R.Civ.P. "If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages ... the court may conduct such hearings or order such references as it deems necessary and proper...." This language indicates a court is *unable to enter judgment until damages are determined*. The entry of default is an official recognition of the failure to appear or otherwise respond, *but is not a judgment by default*.

Ricks v. Weinrauch, 360 S.E. 2d 535, 536 (S.C. App. 1987) (citing H. Lightsey, J. Flanagan, South Carolina Civil Procedure, 77 (2nd Ed.1985)) (emphasis added). The Order therefore constituted an entry of default and not a final judgment within the meaning of S.C.R.C.P. Rule 60. Flint appeared at the damages hearing to contest the entry of default; thus, at this stage of the proceedings, the liberal "good cause" standard pursuant to S.C.R.C.P. Rule 55(c) should have controlled rather than the standard of S.C.R.C.P. Rule 60(b)(1). See Wham v. Shearson Lehman Brothers, Inc., 381 S.E.2d 499 (S.C. App. 1989). Where the improper standard is applied to the

entry of default, "the order refusing to grant ... relief from default is controlled by an error of law and must be vacated." Top Value Homes, Inc. v. Harden, 460 S.E.2d 427, 429 (S.C.App. 1995)

As argued previously by Flint's counsel, Flint acted promptly by filing its Motion to Set Aside Default within ten (10) days of receiving the Notice of Damages Hearing; Flint established the merits of its defense in its answer and the Third-Party plaintiff will not suffer any prejudice by having to litigate his case.

(A) Public Policy Favors Trials on Merits Rather Than Technical Defects.

The fact that courts have the power to set aside the entry of default evinces a long-standing judicial preference in favor of a trial of claims on their merits over the entry of judgment by default. "The discretionary element makes it clear that the party requesting a judgment by default is not entitled to one as of right... Rule 55(c) should be liberally construed so as to promote justice and dispose of cases on the merits." In re Estate of Weeks, 329 S.C. 251, 260 (S.C.App. 1997). See also Columbia Pools, Inc. v. Galvin, 339 S.E. 2d 524 (S.C. App. 1986), Micronics, Inc. v. South Carolina Department of Revenue, 548 S.E. 2d 223 (S.C. App. 2001). In this instance, "[w]here the entry of default occurs at the pleading stage ...there is good cause to try the case on its merits rather than on procedural defect." J. Flanagan, *South Carolina Civil Procedure* (3rd Ed.) at 457.

(B) Service Upon Flint Was Void.

As Flint argued, S.C.R.C.P. Rule 14(a) requires the Defendant\Third Party Plaintiff to obtain leave of the court before filing and serving the third party complaint in this action. Mr. Bruce, however, filed and served the third party complaint seven (7) days before the entry of the

order granting him leave to file and serve his complaint on Flint. An order is not final until it is written and entered. First Union National Bank vs. Hitman, Inc., 306 S.C. 327, 411 S. E. 2d 681 S.C. App. 1991). As a result of the failure by the Defendant to comply with the requirements of S.C.R.C.P. Rule 14(a), the attempted service of the Third-Party Complaint prior to the entry of the order granting the Defendant leave, i.e., before the Court chose to exercise jurisdiction over the matter rendered the service void and ineffective. As a result, the Third Party Defendant is not in default and the underlying judgment, if any, is void.

II. Flint Meets the Standard for Relief under "Excusable Neglect" Standard of Rule 60.

Even if the stricter standard of S.C.R.C.P. Rule 60(b)(1) is utilized by the Court, the affidavit submitted by the Third Party Defendant, the meritorious defense presented by the proposed answer and the lack of prejudice to the Defendant\Third Party Plaintiff¹, are sufficient to meet the stricter standard and justify the entry of an order setting aside the default and granting the Third Party Defendant leave to file an answer in this matter.

III. Default Judgment Does Not Preclude a Challenge on Sufficiency of Pleadings.

However, should the Court deny Flint its Motion to Set Aside Default, either under S.C.R.C.P. Rule 55(c) or Rule 60, the default judgment, if any, does not constitute "an absolute confession by the defendant of his liability and of the plaintiff's right to recover." Ryan v. Homecomings Fin. Network 253 F.3d 778, 780 (4th Cir. 2001). The default does not remove Flint's right to contest the judgment on the grounds that the pleadings are defective, fail to state a claim upon which relief can be granted and/or do not comply with the requirements of the Rules of Civil Procedure. As our supreme court explained:

¹ The underlying action between the Plaintiff and Defendant\Third Party Plaintiff is still pending and has not been tried and no judgement has been entered against the Defendant\Third Party Plaintiff.

The authorities, with practical unanimity, agree that a default admits only what has been well pleaded, and that it does not forfeit or affect the rights of a defendant, except as to matters necessarily admitted by the default. ... Therefore, if the complaint fails to state facts sufficient to constitute a cause of action, any judgment thereon, except one of dismissal, goes beyond the allegations of the complaint[,],...is without authority of law and cannot be sustained.

Gadsden v. Home Fertilizer, 72 S.E. 15, 17, 89 S.C. 483 (S.C. 1911) (internal citations omitted) (emphasis added.) Masters v. Rodgers, 321 S.E.2d 194, 196 (S.C.App. 1984) ("the default judgment did not preclude the [defendant] from challenging the sufficiency of the complaint as the basis for judgment"); Mutual Savings and Loan Assoc. v. McKenzie, 274 S.C. 630, 632, 266 S.E. 2d 423 (1980) ("A party seeking a default judgment is entitled to only such relief as is framed by his pleading, and then only to the extent requested therein. ... if a complaint fails to state a cause of action, the rendering of a default judgment thereon is without authority of law and therefore reversible error").

The above cited authorities follow the reasoning articulated by the U.S. Supreme Court in Thomson v. Wooster, 114 U.S. 104, 112-114 (1885). In this "venerable but still definitive case," the Court announced that "a default judgment may be lawfully entered only 'according to what is proper to be decreed upon the statements of the bill, assumed to be true,' and not 'as of course according to the prayer of the bill.' The defendant is not held . . . to admit conclusions of law." Ryan, 253 F.3d 778, 780.

Directly on point is Mutual Savings in which our supreme court announced that the plaintiff winning by default is afforded no more relief than what would have been granted had a motion to dismiss been timely filed. 266 S.E.2d 423 at 425. To establish the elements of fraud the court looked to an earlier case which did not involve a default. *Id.* The court then announced that, because the facts contained in the four corners of the complaint failed to plead the required

elements, the entry of a default judgment that was grounded on the insufficient pleadings was necessarily improper.

It is essential that the facts and circumstances which constitute the fraud should be set out clearly. The complaint must allege facts which would afford a basis upon which a jury could properly find support for each of the elements above set forth, and if the complaint fails to allege facts to support any one of the elements of fraud and deceit, then the complaint is fatally defective.

Id at 425. (Internal citations omitted.) As explained herein, Mr. Bruce's Complaint fails to allege facts sufficient to support the relief requested; thus, entering a default or a default judgment built on the deficient complaint is improper and directly conflicts with state and federal precedence.

(A) The Third Party Complaint Is Facially and Fatally Deficient

As argued by Flint's counsel, the Third Party Complaint ("Bruce Complaint") exhibits a fundamental failure to comply with the well-settled principles of third-party practice under S.C.R.C.P. Rule 14. Even under a cursory consideration, Bruce's Third-Party Complaint lacks merits on its face and is procedurally defective. Claims of fraud and unfair trade practices are patently improper under Rule 14(a) when the original complaint alleges a contractual breach. See Beach v. Hudson, 298 S.C. 424 (S.C.App. 1989).

It is black letter law that either (1) a third-party complaint shares identical issues with the main complaint, i.e., based on derivative liability, or (2) is made separately and independently.

(T)he test for joinder of a third party under the impleader rule is not transactional...It differs from the standards for compulsory counterclaims and cross claims, which are appropriate only if they arise from the same "transaction or occurrence" as the underlying suit. Impleader, in contrast, is narrower...[and] is proper *only* to assert a derivative claim against a third-party defendant.

Moore's Federal Practice §14.04 (Matthew Bender 3rd Ed.) (emphasis added). A third party complaint can be maintained if it alleges indemnity, subrogation, express and implied warranty,

or the like. C.J.S. Parties §143 (2010). Mr. Bruce's allegations against Flint make no such claims. As the Bruce Complaint shares no identical issues with the original complaint, the fact that the third-party claims may be "intertwined" (Court Order, p.) with the original action is immaterial and cannot be brought under Rule 14(a) Motion..

Pursuant to S.C.R.C.P. 14(a):

The third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff.

Flint's defenses to the third-party action in no way share any common elements with the defenses Mr. Bruce may have in the action by John Deere; Flint cannot stand in the shoes of Mr. Bruce to assert any of his defenses as to John Deere. Neither can Flint assert any claims against John Deere arising out the transaction.

Our courts have long held that "a party should not be brought in when doing so has the effect of 'overriding repeatedly declared legal rights and revoking well-recognized procedure.'" Simon v. Strock, 39 S.E.2d 209, 211, 209 S.C. 134 (S.C. 1946) (Internal citations omitted.) See also Ehrhardt Tractor & Implement Co., Inc. v. Patterson, 211 S.E.2d 874, 263 S.C. 560 (S.C. 1975.) Allowing Flint to be brought in under Rule 14(a) has the precise effect of revoking well recognized procedures and overriding established rights of third-party defendants, such as Flint. In any jurisdiction, the Bruce Complaint should have been brought separately from the original action by John Deere; the facts contained in the four corners of this Rule 14(a) complaint simply do not support a judgment of third-party liability under the set of circumstances as *alleged*. As

the weight of authority above demonstrates, Flint's default cannot cure what the complaint failed to plead.

(B) Pleadings Are Insufficient to Support A Claim Under Unfair Trade Practices Act

Under South Carolina law, in order to prevail on a claim for violations of Unfair Trade Practices Act, SC §39-5-10, et seq., ("UTPA"), in addition to other required elements, the plaintiff must show that he "suffered monetary or property loss as a result of the defendant's unfair or deceptive act(s)." Health Promotion Specialists, LLC v. South Carolina Board of Dentistry, 27263, slip.op. (S.C. Sup. Ct. filed June 12, 2013) citing Wright v. Craft, 372 S.C. 1, 23, 640 S.E.2d 486, 498 (Ct. App. 2006). This requirement is mandated under S.C. Code § 39-5-140(a), which requires that the plaintiff "suffer[ed]... ascertainable... actual damages....as a result" of any purportedly unfair or deceptive acts. The Bruce Complaint does not allege that Mr. Bruce *ever paid* his repair bill to John Deere Financial. Even at a cursory glance, viewed in a light most favorable to Mr. Bruce, the complaint fails to allege that Mr. Bruce suffered any *actual* damages, ascertainable or otherwise. That the third-party complaint merely recited the element of damages, without asserting how the element was met by the purported facts, is conclusory and would not enable the pleading to survive a motion to dismiss, irrespective of Flint's default.

To allow the entry of default or default judgment to stand on this fundamentally deficient UTPA claim would lead to the incongruous and untenable result that the third-party plaintiff is rewarded with trebled damages that he did not plead. Regardless of default, without the damages element satisfied, the Bruce Complaint could not have stood on its own. Through its improper impleader action the third party plaintiff is attempting to obtain the relief that could not be

accomplished in a separate action. Not setting aside the entry of default or default judgment on this set of facts would overturn century-old precedence regarding third-party practice and judgments in general.

III. The Formal Order Entered July 25, 2013 Includes Matters Not Argued at the Hearing

The formal order filed on July 25, 2013 includes matters which are not supported by the documentation in the court's file or presented at the hearing on July 10, 2013, as follows:

(A) Service of the Third Party Summons and Complaint: The Third Party Defendant did not accept service of the Pleadings. The order states that the Third Party Defendant Flint Equipment Co. "acknowledges acceptance of service" of the pleadings in this matter, and therefore incorrectly implies that the Third Party Defendant formally accepted service of the pleading in this matter. There was no acceptance of service by the Third Party Defendant. Rather the Defendant/Third Party Plaintiff claims to have served the pleadings on the Registered Agent of Service for the Third Party Defendant by certified mail return receipt requested. The Third Party Defendant in its affidavit in support of its Motion to Set Aside the Default and for Leave to File an Answer acknowledges that the pleadings were delivered to its Registered Agent of Service by certified mail. However, the Third Party Defendant does not acknowledge acceptance of service of the pleadings in this matter.

(B) Ruling on Third Party Defendant's Argument that Default Judgment is Void:
The formal order contains arguments and case law which were not presented to the Court at the hearing on July 10, 2013 and which were not referenced by the Court as the basis for its denial of the Third Party Defendant's Motion to Set Aside the Default at the conclusion of the hearing. AS

a result the Third Party Defendant was not presented with an opportunity to respond to these arguments at the hearing on its motion.

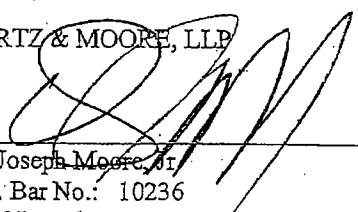
Counsel for the Third Party Defendant notified the Defendant/Third Party Plaintiff of its objection to the inclusion of the foregoing in the proposed order by letter dated July 17, 2013, a copy of which is attached.

Conclusion

For the foregoing reasons the undersigned respectfully request that the Court reconsider its order denying the Third Party Defendant's motion for relief from default and for leave to answer in this matter.

Respectfully submitted

GERTZ & MOORE, LLP



W. Joseph Moore, Jr.
S.C. Bar No.: 10236
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Columbia, SC 29202
(803) 252-1524
Attorneys for the Third Party Defendant
Flint Equipment Co.

August 7, 2013

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Frederick A. Gertz
(S.C., N.Y. & Ga)
W. Joseph Moore, Jr.

Phong T. Nguyen

Telephone (803) 252-1524
Telecopier (803) 799-6946

Alice S. Moore
1946 - 2012

July 17, 2013

VIA FAX TO 864-298-0146
O.W. Bannister, Esquire
Bannister & Wyatt, LLC
PO Box 10007
Greenville, SC 29603.

RE: Jerry A. Bruce vs. Flint Equipment Company
Case No.: 2011-CP-23-07943
G&M No.: 28601.16

Dear Mr. Bannister:

I am in receipt of the proposed order which you have prepared in the above referenced matter. Upon review of the order, I have the following comments or suggestions concerning proposed changes to the Order denying Flint's motion to set aside the default:

1. Page 2 - 3rd paragraph: There was no acceptance of service in this case. Accordingly, I would request the following change to the language in the order.

In the Affidavit submitted in support of its motion, Flint acknowledged that the pleadings were delivered to CT Corporation Systems by certified mail and that CT Corporation Systems forwarded the pleadings via overnight courier to Flint's home office in Georgia.

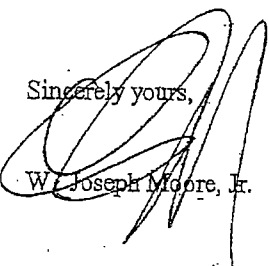
2. Page 2 - last paragraph which continues to page 3. Flint's argument was based on the fact that the clerk's record did not indicate the entry of the judgment of default. I understand that the entry of the judgment of default is a ministerial which is to be entered by the Clerk on receipt of the Affidavit of Default. However, Rules 55(c) and 60 do make a distinction based on this entry.
3. Numbered Section 3 Starting on Page 3: Pursuant to my notes none of the arguments contained in this section were made to the court and I do not recall the Judge's asserting them as grounds for his ruling. Rather it was my understanding that Judge Miller denied my argument on the grounds that the validity of the Third Party Complaint was previously ruled upon by Judge Verdin at the hearing granting Bruce leave to file the Third Party Complaint. Therefore, Judge Miller stated that he was not in a position to and was unwilling to overrule the decision made by another Judge. Accordingly, I would

O.W. Bannister, Esquire
July 17, 2013
page 2

object to the inclusion in the order of any grounds which were not argued at the hearing or expressed by the court as the grounds for its ruling.

Please do not hesitate to contact me if you wish to discuss the foregoing. With kind regards, I
am

Sincerely yours,


W. Joseph Moore, Jr.

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

John Deere Financials, f.s.b.,
Plaintiff,

vs.

Jerry A. Bruce,
Defendant,

AND

Jerry A. Bruce,
Third-Party Plaintiff,

vs.

Flint Equipment Co.,
Third-Party Defendant.

IN THE COURT OF COMMON PLEAS

C/A NO: 2011-CP-23-07943

CERTIFICATE OF SERVICE

The undersigned, attorney with Gertz & Moore, LLP, attorneys for Third-Party Defendant does certify that on the 7th day of August, 2013 I served a copy of the documents listed below upon counsel of record for the Plaintiff and Defendant/Third Party Plaintiff, via *United States Mail First Class*, addressed as follows:

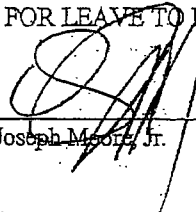
O.W. Bannister, Esquire
Bannister & Wyatt, LLC
PO Box 10007
Greenville, SC 29603

Attorney for Defendant and Third-Party
Plaintiff

B. Craig H. Allen
605 Pettigru Street
Greenville, SC 29601

Attorney for Plaintiff

Documents served: THIRD PARTY DEFENDANT'S AMENDED MOTION AND
MEMORANDUM PURSUANT TO SCRPC RULE 59(e) TO ALTER OR
AMEND ORDER DENYING THIRD PARTY DEFENDANT'S MOTION
TO SET ASIDE DEFAULT AND FOR LEAVE TO FILE ANSWER



W. Joseph Moore, Jr.

Columbia, South Carolina

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2011CP237943

Jerry A. Bruce
(third party plaintiff)

2013 AUG -5 P 2-11

Flint Equipment Co.
(third party defendant)

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: W. Joseph Moore, Jr.

Attorney for: ☐ Plaintiff ☒ Defendant
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ ACTION DISMISSED (CHECK REASON):
☐ Rule 43(k), SCRPC (Settled); ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit);
☐ Other: _____
- ☐ ACTION STRICKEN (CHECK REASON):
☐ Rule 40(j) SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____
- ☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED:

☐ See attached order; (formal order to follow) ☒ Statement of Judgment by the Court:

Third Party Defendant's motion pursuant to SCRPC Rule 59(e) to alter or amend order denying third party defendant's motion to set aside default and for leave to file answer is DENIED.

This order ☐ ends ☒ does not end the case.

ORDER INFORMATION

Additional Information for the Clerk:

INFORMATION FOR THE PUBLIC NOTICE		
Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information indicate "None" in one of the boxes below.		
Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

2013 W.M. Allen
Circuit Court Judge

2130

Judge Code

8/1/13
Date

For Clerk of Court Office Use Only

This judgment was entered on 8/5/13 and a copy mailed first class or placed in the appropriate attorney's box on 8/5/13 to attorneys of record or to parties (when appearing pro se) as follows:

O.W. Bannister Bar No. 506
P.O. Box 10007 Greenville, SC 29603

ATTORNEY(S) FOR THE PLAINTIFF(S)

Craig Allen

W. Joseph Moore, Jr. Bar No. 10236
P.O. Box 456, Columbia, SC 29202

ATTORNEY(S) FOR THE DEFENDANT(S)

Paul B. Wickensimer Greenville County Clerk Of
Court - Clerk of Court

Court Reporter

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE
FILED CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENSIMER

IN THE COURT OF COMMON PLEAS

John Deere Financial, f.s.b., aka FPC
Financial, f.s.b.,

2013 AUG 20 A 8:50

Civil Action No.: 2011-CP-23-7943

Plaintiff,

vs.

Jerry A. Bruce,

Defendant

and

Jerry A. Bruce,

Third-Party Plaintiff,

vs.

Flint Equipment Co.,

Third Party Defendant

THIRD PARTY DEFENDANT'S
COMBINED MOTION AND
MEMORANDUM OF LAW
TO RECONSIDER AND/OR ALTER OR
AMEND THE JUDGEMENT AGAINST
FLINT EQUIPMENT COMPANY

TO: O.W. Bannister, Esquire, Bannister & Wyatt, LLC, Attorney for Jerry A. Bruce,
Defendant/Third-Party Plaintiff

PLEASE TAKE NOTICE that the undersigned as attorney for Flint Equipment Co., the
Third Party Defendant in the above entitled action, hereby moves before the Honorable Edward
W. Miller, pursuant to SCRCR Rule 59(a) and (e), to reconsider and for an order altering and
amending the Judgment Against Flint Equipment Company entered on August 2, 2013, a copy of
which was received by the undersigned on August 6, 2013. This motion is made on the grounds
that the judgment is not supported by the pleading and evidence presented at the damages
hearing on July 10, 2013, as follows:

1. The Third-Party Complaint Is Defective and Does Not Support the Judgment

Under state and federal jurisdictions, a default judgment does not constitute "an absolute confession by the defendant of his liability and of the plaintiff's right to recover." Ryan v. Homecomings Fin. Network, 253 F.3d 778, 780 (4th Cir. 2001). Despite the Court finding it in default, Flint does not relinquish its right to contest the judgment on the grounds that the pleadings are defective, fail to state a claim upon which relief can be granted and/or do not comply with the requirements of the Rules of Civil Procedure.

Flint's right to challenge the judgment is set forth by our supreme court as follows:

The authorities, with practical unanimity, agree that a default *admits only what has been well pleaded*, and that it does not forfeit or affect the rights of a defendant, except as to matters necessarily admitted by the default. ... Therefore, if the complaint fails to state facts sufficient to constitute a cause of action, any judgment thereon, *except one of dismissal*, goes beyond the allegations of the complaint[...], is without authority of law and cannot be sustained.

Gadsden v. Home Fertilizer, 72 S.E. 15, 17, 89 S.C. 483 (S.C. 1911) (internal citations omitted) (emphasis added.) The court in Gadsden explained, "the default does not admit that the facts pleaded are sufficient to constitute a cause of action." *Id.* See Masters v. Rodgers, 321 S.E.2d 194, 196 (S.C.App. 1984) ("the default judgment did not preclude the [defendant] from challenging the sufficiency of the complaint as the basis for judgment"); see also Mutual Savings and Loan Assoc. v. McKenzie, 274 S.C. 630, 632, 266 S.E. 2d 423 (1980) ("A party seeking a default judgment is entitled to only such relief as is framed by his pleading, and then only to the extent requested therein. ... if a complaint fails to state a cause of action, the rendering of a default judgment thereon is without authority of law and therefore reversible error").

The above cited authorities follow the reasoning articulated by the U.S. Supreme Court in Thomson v. Wooster, 114 U.S. 104, 112-114 (1885). In this "venerable but still definitive case,"

the Court announced that “a default judgment may be lawfully entered only ‘according to what is proper to be decreed upon the statements of the bill, assumed to be true,’ and not ‘as of course according to the prayer of the bill.’ The defendant is not held . . . to admit conclusions of law.” Ryan, 253 F.3d 778, 780.

Directly on point is Mutual Savings in which our supreme court announced that the plaintiff prevailing by default is afforded no more relief than what would have been granted had a motion to dismiss been timely filed. 266 S.E.2d 423 at 425. To establish the elements of fraud the court looked to an earlier case which did not involve a default. *Id.*

The complaint must allege facts which would afford a basis upon which a jury could properly find support for each of the elements above set forth, and if the complaint fails to allege facts to support any one of the elements of fraud and deceit, then the complaint is fatally defective.

Id. at 425. (Internal citations omitted.) The court then announced that, because the facts contained in the four corners of the complaint in that instance failed to plead the required elements, the entry of a default judgment was necessarily improper. As explained herein, the allegations fail to plead facts sufficient to support the relief requested; thus, entering a judgment built on the deficient Third-Party Complaint is improper and directly conflicts with state and federal precedence.

(A) The Third Party Complaint Is Facially and Fatally Deficient

As argued by Flint’s counsel, the Third Party Complaint (“Bruce Complaint”) exhibits a fundamental failure to comply with the well-settled principles of third-party practice under S.C.R.C.P. Rule 14. Even under a cursory consideration, Bruce’s Third-Party Complaint lacks merits on its face and is procedurally defective. Claims of fraud and unfair trade practices are patently improper under Rule 14(a) when the original complaint alleges a contractual breach, as

it is in the case at hand. See Beach v. Hudson, 298 S.C. 424 (S.C.App. 1989). See also Laughlin v. Dell Financial Services, L.P., 465 F.Supp.2d 563 (D.S.C. 2006).

Although S.C.R.C.P. 14(a) provides that a defendant in an action may join "a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him," its use is highly restricted. S.C.R.C.P. 14, which mirrors the federal rule for impleader, have been interpreted to require that either (1) a third-party complaint shares identical issues with the main complaint, i.e., based on derivative liability, or (2) is made separately and independently.

(T)he test for joinder of a third party under the impleader rule is not transactional...It differs from the standards for compulsory counterclaims and cross claims, which are appropriate only if they arise from the same "transaction or occurrence" as the underlying suit. Impleader, in contrast, is narrower...[and] is proper *only* to assert a derivative claim against a third-party defendant.

Moore's Federal Practice §14.04 (Matthew Bender 3rd Ed.) (emphasis added).

A third party complaint can be maintained if it alleges indemnity, subrogation, express and implied warranty, or the like. C.J.S. Parties §143 (2010). See Laughlin, 465 F.Supp.2d 563, 567. In an action for unfair trade practices and defamation, the defendant in Laughlin, Dell Financial, sought to join the plaintiff's son for fraudulently using the father's social security number to obtain a line of credit from the defendant and for the son's subsequent failure to pay on the account. Dell Financial argued that "but for" the action of the son it would not have been liable to the father.

The court denied the defendant's Rule 14 motion. However liberally Rule 14(a) is to be construed, it "does not allow the defendant to assert a separate and independent claim even though the claim arises out of the same general set of facts as the main claim." See also Beach v. Hudson, 298 S.C. 424, 427 ("A third party claim may be asserted under Rule 14(a) only when

the third party's liability is in some way dependent on the outcome of the main claim or when the third party is secondarily liable to defendant.")

Bruce's allegations against Flint do not set forth any legal grounds to implicate Flint's liability for indemnity, subrogation, contribution, expressed or implied warranty or the like. As the Bruce Complaint shares no identical issues with the original complaint, the fact that the third-party claims may be "intertwined" (Court Order, p. 4) with the original action is thus irrelevant under Rule 14(a).

Pursuant to S.C.R.C.P. 14(a):

The third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff.

Flint's defenses to the third-party action in no way share any common elements with the defenses Mr. Bruce may have in the action by John Deere Financial, f.s.b., ("John Deere"); Flint cannot stand in the shoes of Mr. Bruce to assert any of his defenses as to John Deere. Neither can Flint assert any claims against John Deere arising out the transaction.

Our courts have long held that "a party should not be brought in when doing so has the effect of 'overriding repeatedly declared legal rights and revoking well-recognized procedure.'" Simon v. Strock, 39 S.E.2d 209, 211, 209 S.C. 134 (S.C. 1946) (Internal citations omitted.) See also Ehrhardt Tractor & Implement Co., Inc. v. Patterson, 211 S.E.2d 874, 263 S.C. 560 (S.C. 1975.) Allowing Flint to be brought in under Rule 14(a) has the precise effect of revoking well recognized procedures and overriding established rights of third-party defendants, such as Flint. In any jurisdiction, the Bruce Complaint should have been brought separately from the original action by John Deere; the facts contained in the four corners of this Rule 14(a) complaint simply do not support a judgment of third-party liability under the set of circumstances as *alleged*. As

the weight of authority above demonstrates, Flint's default cannot cure what the complaint failed to plead.

(B) Pleadings Are Insufficient to Support A Claim Under Unfair Trade Practices Act

Rule 14(a), when properly applied, only allows for contingent or derivative liability, i.e., the third party defendant is liable to the defendant *only if* the defendant has been found liable to the plaintiff. A claim under South Carolina Unfair Trade Practices Act, however, demands more than contingent liability; it requires actual damages suffered. Pursuant to SC Code §39-5-10, *et seq.*, ("UTPA"), in South Carolina, the plaintiff must show that he "suffered monetary or property loss as a result of the defendant's unfair or deceptive act(s)." Health Promotion Specialists, LLC v. South Carolina Board of Dentistry, 27263, slip.op. (S.C. Sup. Ct. filed June 12, 2013). Pursuant to S.C. Code § 39-5-140(a) relief is afforded to a plaintiff who "suffers an ascertainable loss of money or real or personal property....as a result" of any purportedly unfair or deceptive acts. The Bruce Complaint does not allege that Mr. Bruce *ever paid* his repair bill to John Deere. Even at a cursory glance, viewed in a light most favorable to Bruce, the complaint fails to allege that Bruce suffered any *actual* damages, ascertainable or otherwise. That the third-party complaint merely recited the element of damages, without pleading that the damages had actually been incurred, is conclusory and would not enable the pleading to survive a motion to dismiss, irrespective of Flint's default or of the improper Rule 14 Motion.

To allow the judgment to stand on this fundamentally deficient UTPA claim would lead to the incongruous and untenable result that the third-party plaintiff is awarded trebled damages that were not plead because there were none. Regardless of default, without the damages element satisfied, the Bruce Complaint could not have stood on its own. Through its improper impleader action, the third party plaintiff is attempting to obtain relief that could not be accomplished in a

separate action. An entry of default judgment on the current set of facts would contravene the expressed unambiguous language of S.C. Code § 39-5-140(a), in addition to overturning century-old precedence regarding third-party practice and judgments in general.

2. The Evidence Presented At the Damages Hearing Does Not Support the Award

The entry of default does not relieve the Third Party Plaintiff of the burden to proving his damages.

A defendant in default admits liability but not he damages as set forth in the prayer for relief. Rhenney v. Dobbs House, Inc., 275 S.C. 562, 566, 274 S.E. 2d 209, 292 (1981). *The amount of damages in a default action must be proved by the preponderance of the evidence.* Id.; see Jackson v. Midlands Human res. Ctr., 296 S.C. 526, 529, 374 S.E.3d 505, 507 (Ct. App 1988) ("A judgment for money damages must be warranted by the proof of the party in whose favor it is rendered.") [T]here is a difference between a defendant being declared in default and subsequently having judgment entered against him for damages. By defaulting, a defendant forfeits his "right to answer or otherwise plead to the complaint." In essence, the defaulting defendant has conceded liability. *However, a defaulting defendant does not concede the [a]mount of liability.* Howard v. Holiday Inns, Inc., 271 S.C. 238, 241-42, 246 S.E. 2d 880, 882 (1978). . . . *In a default case the plaintiff must prove by competent evidence the amount of his damages, and such proof must be by a preponderance of the evidence.* Although, the defendant is in default as to liability, the award of damages must be in keeping not only with the allegations of the complaint and the prayer for relief, but also with the proof that has been submitted. Jackson 296 S.C, at 529, 374 S.E. 2d at 506 (citations omitted).

Solley v. Navy Federal Credit Union, Inc., 723 S.E. 2d 597, 397 S.C. 192 (S.C.App 2012) (emphasis added)

Mr. Bruce did not present any evidence that he has sustained damages as a result of the allegations set forth in the third party complaint. Bruce's claim arises out of the allegations that Flint wrongfully charged his John Deere line of credit for unauthorized or unnecessary repairs made to Bruce's John Deere track hoe. However, there is no testimony or a shred of evidence that he sustained any loss of money or property as a result of the alleged actions of Flint. Rather, Bruce testified that he disputed the charges for the repairs and has refused to pay same.

As a result of Bruce's refusal to pay his account, John Deere commenced the parent action against Bruce to collect the balance owed on the credit line. Bruce continues to dispute the charges and John Deere's claim; no payment has been made on the account of the disputed amounts. No hearing has been held on John Deere's claim and no judgment has been entered against Bruce. All of the evidence of damage presented by Bruce related to potential liability and speculative damages. Since Bruce failed to present any evidence of an ascertainable loss of money or property as required by S.C. Code § 39-5-140(a) and therefore he is not entitled to judgment under the Unfair Trade Practices Act.

Because Bruce did not present any evidence that he has lost money or property as a result of the actions of Flint, Bruce has failed to meet the burden of proving his damages by a preponderance of the evidence, a standard which requires, at the least, *some* evidence. "It is incumbent upon the judge to make a judicial determination of the amount recoverable based on the proof. A judgment for money damages must be warranted by the proof of the party in whose favor it is rendered". Wingard v. Lee, 287 S.C. 57, 336 S.E.2d 498 (Ct.App.1985). The damages set forth in judgment are not supported by the evidence and the judgment should be set aside.

3. The Award of Treble Damages and Attorney's Fees under the Unfair Trade Practices Act is improper.

As noted above Bruce failed to prove any actual damages in the form of "any ascertainable loss of money or property" as required by S.C. Code § 39-5-140(a) and failed to establish a cause of action under the Unfair Trade Practices Act. Accordingly, Bruce is not entitled to an award of treble damages and attorney's fees pursuant to S.C. Code § 39-5-140(a) and such award is improper.

4. The Defendant/Third Party Plaintiff failed to Present Adequate Evidence to Support the Award of Attorneys' Fees

It is well established in South Carolina that in determining reasonable attorney's fees, consideration should be given by the court to the following six factors:

(1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) beneficial results obtained; and (6) customary legal fees for similar services. *Jackson v. Speed*, 326 S.C. 289, 308, 486 S.E.2d 750, 760 (1997).

All six of the factors should be considered by the Court in awarding attorney's fees, *Baron Data Systems, Inc. v. Loter*, 297 S.C. 382, 377 S.E.2d 296 (1989); and the Court is required to make specific findings of fact for each of the factors *Blumberg v. Nealco, Inc.*, 310 S.C. 492, 427 S.E.2d 659 (1993).

The Attorney's Fee Affidavit submitted at the damages hearing by Defendant\Third Party Plaintiff sets forth the date Bruce's attorney was admitted to practice, the attorney's Martindale-Hubbell rating, the attorney's normal hourly rate and includes a copy of a bill showing the time expended by the attorney in representing the Defendant\Third Party Plaintiff. At best the affidavit addresses only the second (time devoted to the case) and third (professional standing of counsel) of the six factors which the court is required to consider in determining. No evidence was presented with regard to the nature, extent, and difficulty of the case; the necessity of the time devoted to the case; the contingency of compensation; or the legal fees customarily charged for similar services. Further, the order of judgment does not contain specific findings of fact with regard to each of the factors.

The Defendant\Third Party Plaintiff failed to present sufficient evidence to the Court for each of the required factors for the Court to make a determination of the reasonableness of the attorney's fees requested. Accordingly, the Court was unable to and did not make specific

findings of fact in the order as to each of the six factors necessary to establish the reasonableness of the fees to be awarded. Therefore, the award of attorney's fees is improper.

CONCLUSION

For the foregoing reasons the undersigned respectfully request that the Court reconsider the judgment entered in this matter and amend its order to deny judgment to Bruce on the grounds that the pleadings and evidence presented at the damages hearing do not support a cause of action for under the Unfair Trade Practices Act or the award of damages, treble damages and attorney's fees.

Respectfully submitted

GERTZ & MOORE, LLP



W. Joseph Moore, Jr.
S.C. Bar No.: 10236
1416 Laurel Street
P.O. Box 456
Columbia, SC 29202
(803) 252-1524
Attorneys for the Third Party Defendant
Flint Equipment Co.

This 15th day
of August, 2013

STATE OF SOUTH CAROLINA
CLERK OF COURT IN THE COURT OF COMMON PLEAS
GREENVILLE CO. S.C.
COUNTY OF GREENVILLE PAUL B. WICKENSIMER

C/A NO: 2011-CP-23-07943

John Deere Financials, f.s.b. 2013 AUG 20 A 8 57
Plaintiff,

vs.

Jerry A. Bruce,

Defendant,

AND

Jerry A. Bruce,

Third-Party Plaintiff,

vs.

Flint Equipment Co.,

Third-Party Defendant.

CERTIFICATE OF SERVICE

The undersigned, attorney with Gertz & Moore, LLP, attorneys for Third-Party Defendant does certify that on the 15th day of August, 2013 I served a copy of the documents listed below upon counsel of record for the Plaintiff and Defendant/Third Party Plaintiff, via *United States Mail First Class*, addressed as follows:

O.W. Bannister, Esquire
Bannister & Wyatt, LLC
PO Box 10007
Greenville, SC 29603

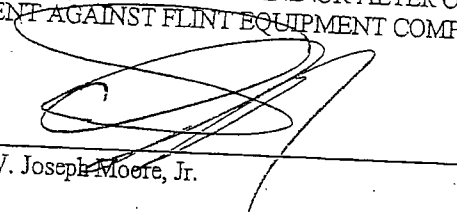
Attorney for Defendant and Third-Party Plaintiff

B. Craig H. Allen, Esquire
605 Pettigru Street
Greenville, SC 29601

Attorney for Plaintiff

Documents served:

THIRD PARTY DEFENDANT'S COMBINED MOTION AND
MEMORANDUM OF LAW TO RECONSIDER AND/OR ALTER OR
AMEND THE JUDGMENT AGAINST FLINT EQUIPMENT COMPANY


W. Joseph Moore, Jr.

Columbia, South Carolina

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE
IN THE COURT OF COMMON PLEAS

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B WICKINSMER

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2011CP237943

Jerry A. Bruce (third party plaintiff)	2013 OCT -8 A	Finco Equipment Co. (third party defendant)
PLAINTIFF(S)		DEFENDANT(S)

Submitted by:	Attorney for: ☐ Plaintiff ☐ Defendant ☐ Self-Represented Litigant
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DISPOSITION TYPE (CHECK ONE)

- ☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit);
☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j) SCRCP; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____
- ☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order; (formal order to follow) ☒ Statement of Judgment by the Court:

Third Party Defendant's Amended Motion and Memorandum Pursuant to SCRCP Rule 59(e) to Alter or Amend the Order Denying Third Party Defendant's Motion to Set Aside Default and For Leave to File an Answer is DENIED.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

Additional Information for the Clerk:

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

SO. J. W. Moore
Circuit Court Judge

2130
Judge Code

10/3/13
Date

For Clerk of Court Office Use Only

This judgment was entered on 10/8/13, and a copy mailed first class or placed in the appropriate attorney's box on 10/8/13, to attorneys of record or to parties (when appearing pro se) as follows:

O.W. Bannister Bar No. 506
P.O. Box 10007 Greenville, SC 29603

ATTORNEY(S) FOR THE THIRD PARTY
PLAINTIFF(S)

W. Joseph Moore, Jr. Bar No. 10236
P.O. Box 456, Columbia, SC 29202

ATTORNEY(S) FOR THE THIRD PARTY
DEFENDANT(S)

Paul B. Wickensimer Greenville County Clerk Of
Court - Clerk of Court

Court Reporter

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2011CP237943

Jerry A. Bruce
(third party plaintiff)

DEPUTY CLERK OF COURT
GREENVILLE CO. S.C.
PAUL S. WICKENSINGER

2013 OCT -8 A 11:55

Flint Equipment Co.
(third party defendant)

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for: ☐ Plaintiff ☐ Defendant
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit);
☐ Rule 43(k), SCRPC (Settled); ☐ Other: _____
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j) SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____
- ☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order; (formal order to follow) ☒ Statement of Judgment by the Court

Third Party Defendant's Combined Motion and Memorandum of Law to Reconsider and/or Alter or Amend the Judgement Against Flint Equipment Company is DENIED.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

Additional Information for the Clerk:

ENTERED COMPUTER

INFORMATION FOR THE PUBLIC INDEX		
Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.		
Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Ed. W. Will
Circuit Court Judge

2130
Judge Code

10/3/13
Date

For Clerk of Court Office Use Only

This judgment was entered on 10/8/13, and a copy mailed first class or placed in the appropriate attorney's box on 10/8/13 to attorneys of record or to parties (when appearing pro se) as follows:

O.W. Bannister Bar No. 506
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ATTORNEY(S) FOR THE THIRD PARTY
PLAINTIFF(S)

W. Joseph Moore, Jr. Bar No. 10236
P.O. Box 456, Columbia, SC 29202

ATTORNEY(S) FOR THE THIRD PARTY
DEFENDANT(S)

Paul B. Wickensimer Greenville County Clerk Of
Court - Clerk of Court

Court Reporter



PowerPlan® Credit Agreement

TERMINOLOGY. In this Agreement the words you, your, and yours mean each person and/or business entity who applies for and is granted a PowerPlan Account, including any co-applicant identified on the application, as well as any person permitted to use the Account. FPC means FPC Financial, L.L.C., or any subsequent holder of the Account or any balances arising under the Account.

POWERPLAN ACCOUNT. You request a PowerPlan Account from FPC, and further authorize FPC to issue a PowerPlan Account card to each merchant from whom you may make a purchase, by applying for a Preferred Account, or by using a Merchant Authorized Account to make a purchase from a merchant who requests FPC to open one for you. You agree that this Credit Agreement will apply to all purchases made through your PowerPlan Account by you or any person you authorize. This Agreement is not binding on FPC until FPC has approved your credit and given you notice of approval. You authorize FPC to honor any purchases you make by mail, telephone, Internet, facsimile transmission (fax) or other electronic means on your Account. You agree that a signature is not necessary as authorization in such cases. You agree that any authorized use of your Account or Card constitutes your acceptance of all the terms and conditions of this Agreement, as it may be amended from time to time. If you submit your application to FPC by Internet, facsimile transmission (fax) or other electronic means, you agree that the application will have the same effect as a signed original. You agree that you will promptly notify FPC in writing of any suspected loss, theft, or unauthorized use of the Account. You may be liable for the unauthorized use of your PowerPlan Account before you notify FPC in writing at PowerPlan, P.O. Box 5327, Madison, Wisconsin 53705-0327 of the unauthorized use. In any case, your liability will not exceed \$50. You agree to give FPC prompt notice of any change in your name, mailing address, or place of employment. You agree that until FPC receives notice of your new address, FPC may continue to send statements and other notices to the address you gave FPC on the application for this Account. You agree that, for the purposes of this Agreement, you will be deemed to "reside" in the state of your billing address or shown on FPC's records. You consent and agree that your telephone conversations with FPC may be recorded to further improve FPC's customer service. You agree that FPC and any affiliate and any retained debt collector may place phone calls to you using any telephone number, including a mobile phone number, you have provided to FPC, any affiliate or any retained debt collector, including calls using an automatic dialing and announcing device and pre-recorded calls, and that such calls are not "unolicited" under state or federal law. If more than one person or entity signed the application, each is jointly and severally responsible for all obligations, and amounts due, under this agreement. This agreement is not binding on FPC until FPC has approved your credit and given you notice of approval.

ACCOUNT TYPE. If your PowerPlan Account arose through FPC's purchase of your existing account balance with a merchant, or at the request of one or more merchants your Account may be classified as a Merchant Authorized Account. Merchant Authorized Accounts are usable only at a merchant who asked FPC to finance your purchases from them. FPC may, in its sole discretion, classify your account as a Preferred Account. Certain special features or promotions that FPC may offer from time to time may be made available only to Preferred Accounts. When FPC opens your Account, and on each monthly statement, FPC will indicate whether your Account is either a Preferred or Merchant Authorized Account.

PowerPlan® is a service of FPC Financial L.L.C.
©2011 FPC (this in U.S.A. (11-06)

PAYMENT APPLICATION. You agree that your payments will be applied as FPC determines in its sole discretion. You agree that FPC has this discretion and that FPC may exercise it to suit its own convenience and interest, without further notice to you. You also agree that FPC may change how it applies payments at any time without notice to you. You acknowledge that the exercise of this discretion by FPC may result in cases in which the application of your payments to your Account creates higher Finance Charges than other payment application methods and that this may include payments allocated to balances with lower APRs before balances with higher APRs and/or to balances with longer promotional periods before balances with shorter or no promotional periods.

You agree that your payments will be credited as of the date of receipt at the address on the payment stub of your Monthly Statement if received by 11:00 a.m. Central Time Monday through Friday (otherwise next business day), but if payment is not accompanied by the payment stub, it is not in the envelope we provided, includes other items, such as other checks, staples or paper clips, or is not received at that location, credit may be delayed up to five days.

If you have been set up for the invoice-specific payment application option (Open Item Billing/Payment by Invoice) and if a purchase made through your account included, in the transaction information sent to FPC, an invoice number, and you later send a payment to FPC that you designate to be applied to that transaction, including the invoice number, that payment will, notwithstanding any other payment application provision on the Agreement, be applied first to pay any unpaid balance due on that transaction, provided, however, that if invoices on your Account are past due, FPC reserves the right to apply any portion of or all of the payment received to these older invoices, unless FPC receives written notice of a dispute with this invoice(s) and acknowledges this dispute in writing. FPC further reserves the right to apply any amount of payment received, even if specific invoices are named, to finance charges that remain past due. Any remaining payment amount will be applied as otherwise specified in this Agreement. The application of any payment to a transaction as described above will not be a waiver of any balance due attributable to other transactions, any Finance Charges or other charges.

MERCHANT CHARGEBACKS. FPC may charge back to a merchant who sold goods or services to you on your Account, any part of your Account balance related to those purchases. In that event, this Agreement will be deemed assigned to the merchant to the extent of the chargeback. You agree to such an assignment and further agree to pay the merchant the amount of such chargeback in accordance with the terms of this Agreement.

DEFAULT. You agree that you will be in default if: (a) you fail to pay the Minimum Required Payment within 10 days after the Payment Due Date; (b) the value of FPC's security interest in any collateral is materially impaired; (c) your ability to repay is materially reduced by you exceeding your credit limit, by a change in your employment, by a change in your obligations, by bankruptcy or insolvency proceedings involving you, or (for community property state residents only) by a change in your marital status or domicile; or (d) the sole proprietor, a partner or a personal guarantor of the business holding the Account dies or becomes incompetent; (e) you have provided FPC false or misleading information relating to your credit application or Account; (f) you fail to perform any other of your obligations under the terms of this Agreement as it may be amended; or (g) you are in default under any agreement you have with FPC or any of its affiliates.

If you fail to make the Minimum Required Payment when due, FPC may close your Account in future purchases. You agree that upon your default, FPC may close your Account to future purchases and that FPC may demand immediate payment of your entire Account balance, after giving you any notice and opportunity to cure the default required by applicable law. In addition, you agree that FPC shall have all the rights of a secured creditor under the Uniform Commercial Code and other applicable law.

DELAY IN ENFORCEMENT. You agree that FPC can delay enforcing its rights under this Agreement without losing them.

ELECTRONIC DISCLOSURE. You agree that any notices and disclosures related to your Account can be delivered to you in printed form or by electronic means if you provided an electronic mail address to FPC when you applied for this Account or at a later date. Until FPC receives notice of a new electronic mail address, FPC may continue to send such notices and disclosures to the electronic mail address you most recently provided to FPC.

GOVERNING LAW. This Agreement must be approved, and all charges and payments to your Account processed by FPC at its office in Madison, Wisconsin. Therefore, this Agreement and your Account will be governed by the substantive law of the United States and to the extent state law applies to this Agreement the substantive law of the State of Wisconsin, regardless of whether or not you reside in Wisconsin. The law of your state of residence will apply to FPC's recovery of any merchandise or other collateral located there.

This is the entire Agreement between you and FPC relating to your Power Plan Account and no oral changes can be made. Invalidity of any provision of this Agreement shall not affect the validity and enforceability of the remainder of its terms.

CHANGING THIS AGREEMENT. IMPORTANT: READ BEFORE SIGNING. THE TERMS OF THIS AGREEMENT SHOULD BE READ CAREFULLY BECAUSE ONLY THOSE TERMS IN WRITING ARE ENFORCEABLE. NO OTHER TERMS OR ORAL PROMISES NOT CONTAINED IN THIS WRITTEN CONTRACT MAY BE LEGALLY ENFORCED. YOU MAY CHANGE THE TERMS OF THIS AGREEMENT ONLY BY ANOTHER WRITTEN AGREEMENT. You agree that FPC may change this Agreement, including the Finance Charge Calculation and the APR, at any time, by providing prior notice to you. To the extent that the law permits and FPC indicates in the notice, the changes will apply to your existing Account balance as well as to future transactions.

IMPORTANT INFORMATION ABOUT PROCEDURES FOR OPENING A NEW ACCOUNT. To help the government fight the funding of terrorism and money laundering activities, Federal law requires all financial institutions to obtain, verify, and record information that identifies each person who opens an account. What this means for you: When you open an account, you will be asked for your name, address, date of birth, and other information that will allow FPC to identify you. You may also be asked to show your driver's license or other identifying document.

Your Choice to Limit Marketing

- The John Deere Credit companies are providing this notice. They include Deere & Company, Deere Credit, Inc., John Deere Construction & Forestry Company and FPC Financial, L.P.
- You may limit the John Deere companies, such as the manufacturing, credit, leasing and insurance affiliates, from marketing their products or services to you based on your personal information that they receive from any John Deere Credit company. This information may include your income, account history, and credit score.
- Your choice to limit marketing offers from the John Deere companies will apply for at least 5 years from when you tell us your choice. Once that period expires, you will receive a renewal notice that will allow you to continue to limit marketing offers from the John Deere companies for at least another 5 years.
- To limit marketing offers, contact us (800-634-9661).

ACCOUNT USE. By applying for or accepting a PowerPlan Commercial or Governmental Account, you agree to use your Account primarily to make purchases for commercial or governmental use, and not for personal, family or household use. You agree to pay FPC all amounts charged by the use of the Account, plus Finance Charges, and the other charges described below. FPC will allow a purchase of authorized goods or services from a participating merchant to be made through your account as long as (1) you are not in default; (2) your financial condition has not materially or adversely changed; and (3) we have not been provided information by third parties that indicates serious charge-offs or delinquencies with other of your accounts.

You agree that FPC is not responsible for the refusal of anyone to allow a purchase to be made through your PowerPlan Account.

CREDIT LIMIT. FPC will establish and advise you of your regular credit limit when FPC opens your Account and in each monthly statement. FPC may establish separate credit limits with special conditions which will be disclosed to you on your monthly statement. Your use of any such special credit limit shall constitute your agreement to those disclosed special conditions.

You agree that FPC may increase or decrease your credit limit at any time, in FPC's sole discretion, without prior notice to you. You agree to promptly prepare and provide to FPC any financial and Account information that FPC may, in its sole discretion, request from you.

MONTHLY STATEMENT. FPC will send you a monthly statement whenever there is activity on your Account, unless the only activity is a payment in full. Your monthly statement will show your New Balance, any Finance Charge, any Late Fees, the Minimum Required Payment and the Payment Due Date. In addition, it will show your Credit Limit(s), an itemized list of current Purchases, Payments, and Credits, as well as other information concerning your Account.

FPC will send your monthly statements on dates and in intervals determined by FPC. Such statements shall be deemed correct and accepted by you unless FPC is notified to the contrary in writing within 60 days of the date of that statement. If you think your monthly statement is incorrect, write to FPC on a separate sheet of the address shown on the back of your billing statement. Describe the error as best you can and include your Account number in all correspondence.

PAYMENT. The Payment Due Date is the date the payment must be received at the address shown on the front of your monthly statement. You may at any time pay your entire New Balance or pay more than the Minimum Required Payment, and you may avoid or reduce Finance Charges by doing so. However, payment of more than the Minimum Required Payment, while reducing your balance will not prepay your Account or be applied against future Minimum Required Payments. If your Payment Due Date falls on a Saturday, Sunday or holiday, the Payment Due Date will not be extended. All payments must be in U.S. dollars and drawn on funds on deposit in the United States. Payments must be sent to PowerPlan, at the address designated on your monthly payment stub or to any other payment address FPC later designates on your monthly statement payment stub.

FINANCE CHARGE RATES. Finance Charges on your PowerPlan Account may be calculated using variable rates that will be determined by reference to a "Base Rate" to which is added a "Spread" to arrive at the current rate. The same Spread will be used for purchases within your Account.

The Base Rate from which your variable rates will be determined is the annual percentage rate of interest announced publicly from time to time by Citibank, N.A. in New York, New York as its base rate is used for interest rate determinations, which was in effect at the close of business on the fifteenth (15th) calendar day of each

month, or the next succeeding business day if the fifteenth is not a business day ("Reference Day"). The Spread added to the Base Rate to determine the ANNUAL PERCENTAGE RATE (APR) that will apply to your Account will be:

Spread 14.9%

Rate increases and decreases, that result from changes in the Base Rate will take effect on the first day of the month, or the next succeeding business day if the first day is not a business day, after the Reference Day on which the Base Rate changes.

Changes in your variable rates will apply to your existing balances as well as to future purchases. An increase in your rate will increase the total Finance Charge occurring on your Account and the balance on which your Minimum Required Payment is calculated.

Currently effective rates are shown below:

	Daily Periodic Rate(s) Regular Purchases	Annual Percentage Rate(s) Regular Purchases
Rate:	.053157%	19.40%

The above rates are correct as of the date of printing, November 1, 2003, but are subject to change after that date.

FINANCE CHARGE CALCULATION. Finance Charges will occur on your Account balances as follows:

FPC will assess a FINANCE CHARGE, calculated as shown below, if your New Balance is not paid in full on or before the Payment Due Date. To avoid additional Finance Charges on purchases, you must pay the New Balance, in full on or before the Payment Due Date.

The amount of your Finance Charges will be determined as follows:

FPC uses the daily periodic rates and corresponding APR shown in this Agreement. The applicable periodic rate is applied to the "Average Daily Balance" of your purchases, including current transactions, during the current billing cycle.

To get the "Average Daily Balance", FPC takes the beginning balance of your purchases each day, starting with any Previous Balance outstanding on the first day of the monthly billing cycle, add new purchases and debits and subtract payments or credits. This determines the daily balance. Unless FPC elects to use a later date, purchases are added to the daily balance as of the date of purchase.

FPC totals the daily balances for the billing cycle and divides the total by the number of days in the billing cycle. This gives FPC the "Average Daily Balance" which is shown on your monthly statement. Finance Charges may occur on Special Promotional Transactions at a different rate, as explained in the Special Promotions section of this Agreement.

DEFAULT FINANCE CHARGE RATE. If you are in default, you may no longer qualify for any reduced interest rate Special Promotions and you agree that, at FPC's option, the APR applicable to any outstanding reduced interest rate Special Promotion(s), may be increased to the APR described in this agreement.

A MINIMUM FINANCE CHARGE of One Dollar will be made when the result of the application of the periodic rate(s) to the "Average Daily Balance" is less than One Dollar.

MINIMUM REQUIRED PAYMENT. Except as provided below, you agree to pay each month a combined Minimum Required Payment equal to:

1. Any late payment fee due; plus
2. Any additional fees due; plus
3. Any amount past due; plus
4. For Purchases:
 - (a) Either the greater of \$50, or 20% of your New Balance (less any Conversion Balance (balances transferred to PowerPlan from a merchant's account receivable) and less any Special Promotions Transaction(s) balances on which no payment is due) if it exceeds \$50;
 - (b) Or your entire New Balance (less any Conversion Balance and Special Promotions Transaction(s) balances on which no payment is due, if it is less than \$50.
5. The amount of any Special Promotions Transaction that is due;
6. For Conversion Balances:
 - (a) Either the greater of \$50, or 20% of your Conversion Balance, if that balance exceeds \$50;
 - (b) Or your entire Conversion Balance, if it is less than \$50;
7. Any Due in Full Balance.

DUE-IN-FULL PROVISION FOR GOVERNMENTAL ACCOUNTS. If you are a local, state or federal government agency or department, you agree to pay the entire balance of your account on the date shown on your monthly statement.

DUE-IN-FULL PROVISION FOR OPEN ITEM BILLING/PAYMENT BY INVOICE ACCOUNTS: If your Account has been set up for our invoice specific payment application option, the entire balance will be due on the date shown on your monthly statement.

RENTAL TRANSACTIONS: Any transaction that includes the financing of an equipment rental charge will be due in full at the end of the next billing cycle, and that amount must be paid in addition to any Minimum Required payment described above.

SPECIAL PROMOTIONS. From time to time special promotional financing terms, such as extended free periods, incentive interest rates on certain purchases for limited time periods, or other promotions may be available at the discretion of FPC. These special terms will be disclosed by the merchant at the time of purchase. Purchases you make during these special promotions will be separately identified on your monthly statement and will become part of the balance on which your FINANCE CHARGE and Minimum Requirement Payment are calculated at the time provided in the special promotion terms disclosure. These transactions include:

NO-PAYMENTS/NO-INTEREST TRANSACTIONS. Unless otherwise disclosed, minimum monthly payments will be deferred and Finance Charge will not accrue during any disclosed No-Payments/No-Interest period described. Finance Charges will accrue at the APR applicable to your Account after this due date of your No-Payment/No-Interest transaction, unless otherwise disclosed.

SAME AS CASH TRANSACTIONS. Unless otherwise disclosed, minimum monthly payments will be deferred and Finance Charge will accrue during any Same As Cash period described on your monthly statement. No Finance Charge will be due until the end of this Same As Cash period and any accrued Finance Charge will be waived if the entire Same As Cash balance is paid in full by the end of the Same As Cash period.

OTHER FEES & CHARGES. FPC will add to your Account: (1) A Late Payment Fee of \$50 if FPC has not received a payment of at least the current portion of the Minimum Required Payment (Minimum Required Payment plus unpaid late payment fees and past due amounts) within 10 days after the Payment Due Date; (2) A Returned Payment Fee of \$45, for any check or electronic payment authorization that is dishonored upon first presentation; (3) expenses incurred in connection with the enforcement of our remedies upon default, including without limitation, (a) repossession, repair and collection costs, (b) attorney fees plus court costs and related fees, including any bankruptcy fees and costs, if FPC refers your Account for collection to an attorney; (4) any filing fee paid by FPC required for any Uniform Commercial Code ("UCC") financing, continuation or termination statement related to the perfection of the security interest granted to FPC; and (5) a \$20 processing fee for the processing of those UCC filings. Any credit balance in excess of \$5 on your account will be refunded within 30 business days from FPC's receipt of your written request. Otherwise, FPC will refund to you any credit balance remaining on your account after six months. You agree that FPC may retain any credit balance if it is less than \$5 or if FPC does not know your address and it cannot be traced through the last address or telephone number provided to FPC.

ACCEPTING PAYMENT. You agree that FPC can accept late or partial payments, as well as payments marked "paid in full" or with either restrictive endorsement, without losing any of its rights under this Agreement.

DISCLOSURE OF FINANCIAL INFORMATION. You agree that FPC may report your performance under this Agreement to credit reporting agencies and others who request a credit reference from FPC. You agree that FPC may ask credit reporting agencies or others you list as a credit reference for consumer reports or information regarding your credit history at any time for all legitimate purposes, including credit decisions and the review and collection of your account. You authorize FPC to share information regarding your Account with its corporate affiliates and other companies that offer products and services FPC believes may be of interest to you. FPC's affiliates may use certain consumer report information as a factor in establishing your eligibility for consumer credit. If you object to this, you must notify FPC by calling PowerPlan Consumer Service at 800-633-7661, and providing your name, Social Security number, address and Account number, and certain information will not be provided to these affiliates.

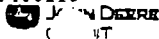
CLOSING YOUR ACCOUNT. You may close your Account at any time by notifying FPC in writing. You agree that FPC may close or suspend your Account to future purchases at any time without prior notice. You agree that FPC may close or suspend your Account to future purchases if your Account has no activity for 6 or more months. You agree that regardless of the closing or suspension of your Account, you remain responsible for paying the amount you owe FPC according to the terms of this Agreement.

SECURITY INTEREST. You grant FPC a purchase money security interest in all merchandise purchased through your Account, and its proceeds, including insurance proceeds, but this provision does not apply if you reside in NC and the APR on a purchase or transaction exceeds 15%. FPC's security interest continues until such merchandise is paid for in full by application of your payments in the manner described in this Agreement. You agree that all funds owed to you, or received by you, from anyone renting from the labor and materials supplied by you which were purchased through your Account will be held in trust for FPC's benefit ("Trust Funds"). You agree to promptly pay to FPC those Trust Funds, you agree that you have no interest in those Trust Funds and you irrevocably assign to FPC your accounts receivable that comprise those Trust Funds. You authorize FPC, at its option, to direct any such Trust Funds owed to you be made jointly payable to you and FPC.

06/07/2010 11:14 FAX 8848480219

(Page 1 of 2)

PLEASE PRINT OR TYPE



McAfee Tractor
Phone: 800-323-8542
Fax: 800-826-8267



Phone: 800-834-8661
Fax: 800-436-3224

Dealership Name: _____ Salesman/Location: _____ Dealer #: _____ Date: _____
Applying for: ☐ Retail Note ☐ Lease ☒ PowerPlan ☐ Municipal

Fields marked with an asterisk (*) are required by law (USA PATRIOT Act) when applying for revolving credit. Your application can not be processed without this information.

APPLICANT INFORMATION - Full legal name and address of Business - Corporation, Partnership, Trust, Sole Proprietorship or Municipality

Business Name* Jerry A Bruce DBA (if any) _____ Federal Tax ID Number 61-1550837
Physical Address* 1848 New Bruce Rd Greer SC 29651 City _____ County _____ State _____ Zip _____
Mailing Address (if different than the above) _____ City _____ County _____ State _____ Zip _____

Business Phone # 864 915 0588 Fax # _____ E-Mail Address brucegrading@aol.com
State in which the business is registered or incorporated SC Date business incorporated, Partnership formed, or Sole Proprietorship started 1990 Time in current address: 56 years

Primary Applicant Information - Personal, Officer, Partner, Member or Municipal Contact Information († Required if individual)

First Name* Jerry Middle* A Last Name* Bruce Title owner DOB † 12/22/53 Social Security # † 250-94-8392
Physical Address of Primary Officer, Partner, Owner or Member (if different than above) _____
Physical Address* Same City _____ County _____ State _____ Zip _____

Home Phone # 864 895 1767 Mobile Phone # 915-0588 E-Mail Address brucegrading@aol.com Are you a U.S. Citizen? YES ☒ NO ☐
Type of business* ☒ Individual ☐ Sole Proprietor ☐ S Corp ☐ C Corp ☐ Municipality
(please check one) ☐ LLC ☐ Limited Partnership ☐ General Partnership ☐ Trust

* If applying as an LLC a copy of the Operating Agreement & Articles of Organization is required with this application or Partnership Agreement if applying as a Partnership or Trust Agreement if applying as a Trust.

Additional Owner(s), Partner, Member(s), and/or Officer(s) Information- Use a separate sheet listing name(s), title(s), % Owned, address(es), phone #s, SSN(s), and date(s) of birt

CO-APPLICANT INFORMATION

First Name* _____ Middle* _____ Last Name* _____ Title _____ DOB † _____ Social Security #* _____
Physical Address* _____ City _____ County _____ State _____ Zip _____
Phone # _____ Fax # _____ E-Mail Address _____ Are you a U.S. Citizen? YES ☒ NO ☐

FINANCIAL INFORMATION and BANK/LOAN REFERENCES NOTE: <*> indicates required information

Please submit the two most recent years of accountant prepared corporate and/or personal financial statements and work in progress (jobs on hand) report with this application.

Annual Gross Sales _____ Net Income _____ Net Worth _____
Bank Name _____ ACCT # _____ Phone # _____ Contact Name _____
Greer State Bank 01320811 864 877 2000 Bill Hughes
Equipment Finance Co. _____ ACCT # _____ Phone # _____ Contact Name _____
John Deere Credit - bought new 200LCC trackhoe
Equipment Finance Co. _____ ACCT # _____ Phone # _____ Contact Name _____

YEARS IN BUSINESS _____ YEARS _____ HAVE YOU EVER FILED BANKRUPTCY? YES ☒ NO ☐ HAS A JUDGEMENT EVER BEEN FILED AGAINST YOU? YES ☒ NO ☐

INSURANCE INFORMATION NOTE: not applicable to revolving credit

Insurance Agency Name _____ Contact Name _____ Policy # _____ Phone # _____ Fax # _____
Nationwide Brad Hollifield 864 848 2800
Physical Address _____ City _____ County _____ State _____ Zip _____
Greer SC

If you do not have insurance would you like to have JD Sentry UltraGard Physical Damage Insurance quoted and applied to your payments? YES ☐ NO ☒

Notice to Applicant: You represent that the information given in the entire application, including all applicant names and any other information provided in this credit application is (1) true, correct and complete, and (2) provided for the purpose of obtaining credit in an amount not less than the credit policies and practices of FPC Financial, L.P. (FPC), Deere Credit, Inc. (DCI) or John Deere Construction and Forestry Company (JDCFC) (collectively referred to as "we"). You hereby authorize the release to us of your design and any assignee or potential assignee (person) (1) your credit information from any source including, but not limited to, your business credit, cash flow, statements, and any income statement. The authorization shall apply to this application and subsequently for the purposes of updates, renewal, or amendment of such credit and for reviewing or collecting the resulting account.

You understand that any decision to grant or deny an installment or lease application will be made by DCI or JDCFC in Iowa. You understand that any decision to grant or deny revolving credit will be made by FPC in Wisconsin. You understand that this application may be used for obtaining credit or lease approval for any DCI or JDCFC product. If you are applying for a PowerPlan account, you acknowledge that you have received a true copy of the credit agreement and agree to its terms and you understand that account is for commercial and governmental use only. You authorize us to share information with our affiliates, disclose financial information about you as described in the credit agreement and further releases and disclosures sent to you, and to send you information by telephone or other electronic means. You also agree that any notices or disclosures can, at your option, be provided electronically to the E-mail address that you provided us. You further certify that you are authorized to sign on behalf of the applicant.

This Credit Application consists of two (2) pages. Notice to Applicant is contained on the next page.

PRIMARY APPLICANT

By: Jerry A Bruce Printed Name of Signer: Jerry A Bruce Date: 6/7/10
☒ Individually ☐ If primary applicant is a corporation or other form of legal entity, title of signer: _____

CO-APPLICANT

By: _____ Printed Name of Signer: _____ Date: _____
☐ Individually ☐ If co-applicant is a corporation or other form of legal entity, title of signer: _____

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Case No. 2011-CP-23-7943

John Deere Financial, f.s.b., f.k/a FPC Financial, f.s.b. Plaintiff,

vs.

Jerry A. Bruce, ...Defendant/Third Party Plaintiff

vs.

Flint Equipment Co., ...Third Party Defendant

Of which

Jerry A. Bruce,
(Third-Party Plaintiff).....Respondent

v.

Flint Equipment Co
(Third-Party Defendant).....Appellant

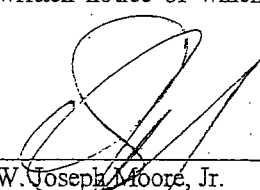
NOTICE OF APPEAL

Flint Equipment Co. appeals the order from the following in the above referenced matter:

1. The Order of the Honorable Edward W. Miller dated July 23, 2013 Denying the Appellant's Dual Motion to Set Aside Default Judgment and For Leave to File and Answer together with the Order of the Honorable Edward W. Miller dated October 8, 2013 denying the Appellant's motion pursuant to Rule 59, SCRCP, to Reconsider, Alter or Amend said Order, written notice of which was received on October 11, 2013.

2. The Judgment entered against the Appellant by Order of the Honorable Edward W. Miller dated July 23, 2013, together with the Order of the Honorable Edward W. Miller dated October 8, 2013 denying the Appellant's motion pursuant to Rule 59, SCRCP, to Reconsider, Alter or Amend said Judgment, written notice of which was received on October 11, 2013.

November 4, 2013



W. Joseph Moore, Jr.
Gertz and Moore, LLP
1416 Laurel Street
P.O. Box 456
Columbia, SC 29202
(803) 252-1524 Phone
(803) 799-6946 Fax

O.W. Bannister
Bannister & Wyatt, LLC
P.O. Box 10007
Greenville, SC 29603
Attorney for Respondent

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Case No. 2011-CP23-7943

John Deere Financial, f.s.b., fka FPC Financial, f.s.b.....Plaintiff,

vs.

Jerry A. Bruce, ...Defendant\Third Party Plaintiff

vs.

Flint Equipment Co., ...Third Party Defendant

Of which

Jerry A. Bruce, Defendant\Third-Party Plaintiff.....Respondent

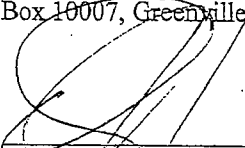
vs.

Flint Equipment Co, Third Party Defendant.....Appellant

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on Jerry A. Bruce by depositing a copy of it in the United States Mail, postage prepaid, on November 4, 2013, addressed to his attorney of record, O.W. Bannister, at his office at P.O. Box 10007, Greenville, SC 29603.

November 4, 2013


W. Joseph Moore, Jr.
Gertz and Moore, LLP
1416 Laurel Street
P.O. Box 456
Columbia, SC 29202
(803) 252-1524 Phone
(803) 799-6946 Fax

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2011CP237943

Jerry A. Bruce
(third party plaintiff)

CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENSMEYER

2013 OCT -8 A 11:55

Flint Equipment Co.
(third party defendant)

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for: ☐ Plaintiff ☐ Defendant
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRCF; ☐ Rule 41(a), SCRCF (Vol. Nonsuit);
☐ Rule 43(k), SCRCF (Settled); ☐ Other: _____
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j) SCRCF; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____
- ☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order; (formal order to follow) ☒ Statement of Judgment by the Court

Third Party Defendant's Combined Motion and Memorandum of Law to Reconsider and/or Alter or Amend the Judgement Against Flint Equipment Company is DENIED.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

Additional Information for the Clerk:

ENTERED COMPUTER

INFORMATION FOR THE PUBLIC INDEX		
Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.		
Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Ed. W. Moore
Circuit Court Judge

2130
Judge Code

10/3/13
Date

For Clerk of Court Office Use Only

This judgment was entered on 10/8/13, and a copy mailed first class or placed in the appropriate attorney's box on 10/8/13 to attorneys of record or to parties (when appearing pro se) as follows:

O.W. Bannister Bar No. 506
P.O. Box 10007 Greenville, SC 29603

ATTORNEY(S) FOR THE THIRD PARTY
PLAINTIFF(S)

W. Joseph Moore, Jr. Bar No. 10236
P.O. Box 456, Columbia, SC 29202

ATTORNEY(S) FOR THE THIRD PARTY
DEFENDANT(S)

Paul B. Wickensimer Greenville County Clerk Of
Court - Clerk of Court

Court Reporter

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE
IN THE COURT OF COMMON PLEAS

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
JAN 15 WICKI NSIMER

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2011CP237943

Jerry A. Bruce
(third party plaintiff)

2013 OCT - 8 A

File Equipment Co.
(third party defendant)

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for: ☐ Plaintiff ☐ Defendant
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit);
☐ Rule 43(k), SCRPC (Settled); ☐ Other: _____
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j) SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____
- ☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order; (formal order to follow) ☒ Statement of Judgment by the Court

Third Party Defendant's Amended Motion and Memorandum Pursuant to SCRPC Rule 59(e) to Alter or Amend the Order Denying Third Party Defendant's Motion to Set Aside Default and For Leave to File an Answer is DENIED.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

Additional Information for the Clerk:

INFORMATION FOR THE PUBLIC INDEX		
Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.		
Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

SO. W. W. Moore 2130 10/3/13
Circuit Court Judge Judge Code Date

For Clerk of Court Office Use Only

This judgment was entered on 10/8/13, and a copy mailed first class or placed in the appropriate attorney's box on 10/8/13, to attorneys of record or to parties (when appearing pro se) as follows:

O.W. Bannister Bar No. 506
P.O. Box 10007 Greenville, SC 29603
ATTORNEY(S) FOR THE THIRD PARTY
PLAINTIFF(S)

W. Joseph Moore, Jr. Bar No. 10236
P.O. Box 456, Columbia, SC 29202
ATTORNEY(S) FOR THE THIRD PARTY
DEFENDANT(S)

Paul B. Wickensimer Greenville County Clerk Of
Court - Clerk of Court

Court Reporter

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO: 2011CP2307943

FILED CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENSIMER
2013 AUG -2 4 10 PM

John Deere Financial Fsb vs. Jerry A Bruce

CHECK ONE:

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy:
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
☐ Other: _____
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded;
☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order; ☐ Statement of Judgment by the Court

NOTICE

This is a notice to you that an Order Judgment Against Flint Equipment Company in this case has been filed in the Clerk of Court's Office. To obtain a certified copy, you may contact our office by phone (864) 467-8551 or email a request to cnoblitt@greenvillecounty.org. If you would like a copy via email, please provide a valid email address.

Dated at Greenville, South Carolina, this 2nd day of August, 2013.

Court Reporter:

PRESIDING JUDGE -

MAILED HARD COPY TO:

Oscar W. Bannister Bannister & Wyatt, LLC P.O.
Box 10007 Greenville, SC 29603

William Joseph Moore Jr. Gertz & Moore, LLP
P.O. Box 456 Columbia, SC 29202

Craig Horger Allen Craig H. Allen, P.A. P.O. Box
10854 Greenville, SC 29603

ATTORNEY(S) FOR THE PLAINTIFF(S)

** Copy to Attorney General's office- Unfair Trade Practice

ATTORNEY(S) FOR THE DEFENDANT(S)

Paul B. Wickensimer Greenville County Clerk Of Court
Clerk of Court

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2011 CP-23-7943

Jerry A. Bruce

Flint Equipment Company

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: O. W. Bannister

Attorney for : ☒ Plaintiff ☐ Defendant
or
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.

Additional Information for the Clerk : _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
Jerry A. Bruce	Flint Equipment Company	\$31,508.04
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge

Judge Code

Date

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this _____ day of _____, 20____ to attorneys of record or to parties (when appearing pro se) as follows:

O. W. Bannister

P. O. Box 10007

Greenville, SC 29601

ATTORNEY(S) FOR THE PLAINTIFF(S)

W. Joseph Moore, Jr.

P. O. Box 456

Columbia, SC 29202

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter:

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON
PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

This image shows a single sheet of white paper with horizontal ruling lines. The lines are evenly spaced and run across the width of the page. There is no handwriting or other markings on the paper.

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

John Deere Financial, f.s.b., f/k/a
FPC Financial, f.s.b.,

Plaintiff,

vs.

Jerry A. Bruce,

Defendant,

and

Jerry A. Bruce,

Third-Party
Plaintiff,

vs.

Flint Equipment Co.,

Third-Party
Defendant.

IN THE COURT OF COMMON PLEAS

THIRTEENTH JUDICIAL CIRCUIT

CASE NUMBER: 2011-CP-23-7943

**JUDGMENT AGAINST
FLINT EQUIPMENT COMPANY**

This matter came before the Court after proper notice for a damage hearing on the claim that Flint Equipment Company (hereinafter "Flint") violated the Unfair Trade Practices Act, S.C. Code §39-5-10(a).

The facts admitted by Flint by its default are as follows:

Flint sales and services John Deere machinery out of its Simpsonville, SC location. Third Party Plaintiff Jerry A. Bruce (hereinafter "Bruce") purchased a John Deere track hoe and financed the same through John Deere Financial, f.s.b., f/k/a FPC Financial, f.s.b. (hereinafter "John Deere"). The equipment purchased by Bruce had mechanical problems which resulted in a previous legal difficulty between Flint and Bruce. Bruce prevailed and the Flint manager made comments after the proceeding that Bruce would pay one way or the other.

Subsequently Bruce experienced additional mechanical difficulties with the John Deere track hoe and delivered the same to Flint for repairs. While there, Bruce authorized a 400 hour

service for which he paid.

Without authorization from Bruce, Flint replaced a number of parts on the John Deere track hoe in an attempt to fix the mechanical problem. Eventually the problem was fixed with a \$350 part.

Bruce had a line of credit with John Deere which did not require his signature for charges. Flint charged the disputed repairs and replacement parts on Bruce's credit line without his permission. Bruce contested these charges and eventually John Deere brought suit against Bruce for \$6,476.90 unpaid charges and twenty percent (20%) attorney fee in the amount of \$1,295.38 for a total of \$7,772.28.

At the hearing Bruce produced an additional witness who accused Flint of also padding his bill for the repair of his equipment with unnecessary parts and labor.

Bruce presented an attorney fee affidavit for attorney fees and costs incurred in the amount of \$8,191.20. Attorney fee charges were not challenged by Flint.

Padding bills and charging such bills on a customer's credit line is an unfair trade practice that affects the public's interest because of its potential for repetition. The Court finds Bruce is entitled to judgment against Flint in the amount of \$7,772.28.

In the exercise of discretion, the Court will treble those damages to \$23,316.84.

The Court finds that an award of attorney fees is appropriate and Bruce is awarded an award of attorney fees of \$8,191.20 for a total judgment of \$31,508.04.

IT IS SO ORDERED.

Greenville, South Carolina

Date: _____

The Hon. Edward W. Miller,
Judge, Thirteenth Judicial Circuit

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE
IN THE COURT OF COMMON PLEAS

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NO. 2011 CP-23-7943

Jerry A. Bruce

Flint Equipment Company

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: O. W. Bannister

Attorney for : ☒ Plaintiff ☐ Defendant
or
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.

Additional Information for the Clerk :

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
Jerry A. Bruce	Flint Equipment Company	\$31,508.04
		\$
		\$
If applicable, describe the property, including tax map information and address, referenced in the order:		

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Ed W. M...
Circuit Court Judge

2130
Judge Code

7/23/13
Date

ENTERED COMPUTER

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

John Deere Financial, f.s.b., f/k/a
FPC Financial, f.s.b.,

Plaintiff,

vs.

Jerry A. Bruce,

Defendant,

AND

Jerry A. Bruce,

Third-Party Plaintiff,

vs.

Flint Equipment Co.,

Third-Party Defendant.

IN THE COURT OF COMMON PLEAS

THIRTEENTH JUDICIAL CIRCUIT

CASE NUMBER: 2011-CP-23-7943

ORDER

2013 JUL 25 PM 12:54

FILED
CLERK OF COURT
JUL 25 2013
JUL 25 2013

WLB

The above entitled matter came before the Court on July 10, 2013 on the dual motion of Flint Equipment Co. ("Flint") to (1) set aside a default judgment under Rule 55(c) and Rule 60(b)(1), S.C.R.C.P. and (2) declare the default judgment void pursuant to Rule 60(b)(4) and Rule 14(a), S.C.R.C.P.

After reviewing the records in this case, the affidavits and briefs submitted to the Court and hearing the arguments of counsel, the Court makes the following findings of fact and conclusions of law:

1. This Court has jurisdiction over the parties and the subject matter of this action.
2. The motion to set aside default judgment is denied.

This action began with the filing of a Complaint by John Deere Financial, f.s.b., FPC Financial, f.s.b. ("John Deere") on or about November 29, 2011. The essence of the Complaint

1
[Signature]

was that John Deere had honored the charge by Jerry Bruce ("Bruce") on a credit line for a certain amount. Pursuant to Bruce's agreement with John Deere, John Deere was entitled to recover the amount plus attorney fees.

Bruce timely filed an Answer and on December 6, 2012 Bruce moved to add Flint as a third party defendant pursuant to Rule 14(a), S.C.R.C.P. This matter was heard before the Honorable Leticia H. Verdin on February 5, 2013 and Judge Verdin orally ruled from the bench that Bruce could amend his pleadings and file a third party complaint against Flint.

On February 15, 2013, Judge Verdin filed a Form 4 Order confirming her earlier oral ruling.

On February 8, 2013, Bruce filed his Third Party Complaint against Flint and caused the same to be served by mail to C.T. Corporate Systems, the registered agent for Flint. On February 11, 2013, an agent for C.T. Corporate Systems signed the receipt of certified mail which was the Third Party Complaint against Flint.

Flint acknowledges this acceptance of service and the forwarding of the pleadings to its home office in Georgia where the pleadings were delivered but misplaced or lost.

On April 12, ²⁰¹³ ~~2013~~, Bruce filed an affidavit of default against Flint with the clerk of court. On May 30, 2013 the Honorable D. Garrison Hill filed an Order of Default and Order setting damages hearing although no specific damage hearing date was set. On June 4, 2013, Bruce notified Flint of the damages hearing for July 10, 2013. Flint promptly filed motions to set aside the default.

Initially Flint sought to have its motion for default determined by the less strict legal standard of Rule 55(c). Part of its argument for the lesser standard was that the Order of Judge Hill was not an order of default. This interpretation of Judge Hill's Order is misplaced. This

Court finds Judge Hill's Order was for default and therefore the more stringent requirements of Rule (60)(b)(1) must be applied.

The Court finds that Flint has not presented excusable neglect and therefore, good cause for setting aside the default. Flint acknowledges that it is aware of the serious^{NATURE} of lawsuits and pleadings in general. Flint further acknowledges that it has set up a system for reviewing legal pleadings. Flint further acknowledges that it has no knowledge of what happened to the Bruce Third Party Complaint once it was delivered to Flint's home office. As stated by Flint's attorney in open court, the pleading simply disappeared and had not been found. Em

It appears to the Court that the pleadings were properly delivered to the home office where personnel were trained to be aware of the seriousness of pleadings and those pleadings were simply lost or misdirected. Therefore, in the exercise of my discretion, I decline to relieve Flint of the default. Sundown v. Intedged Ind., 383 S.C. 601, 681 S.E.2d 885 (2009).

3. The motion to declare the default judgment void is denied.

Initially the Court is concerned over the appropriateness of using a Rule 14 motion to set aside a default judgment on a claim of lack of jurisdiction. Subject matter jurisdiction is the power of a court to hear and determine cases of a general class to which the proceedings in question belong. Dove v. Gold Kist, 314 S.C. 235, 442 S.E.2d 598 (1994). Certainly this Court can hear claims originating in fraud and unfair trade practices between Flint and Bruce.

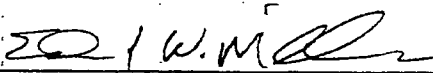
Rule 14 is a procedural rule designed to control what claims can be heard in a particular proceeding. Allowing Flint to raise claims under Rule 14 after a default judgment would allow Flint to contest facts admitted or waived by its default and seems to run contrary to the requirements of Rule 12.

Even if Flint's Rule 14 motion is proper, the Court declines to set aside the default under

the exercise of its discretion. Bruce's claim that Flint charged his credit line for work he did not authorize is admitted by Flint's default and is certainly intertwined with John Deere's claim against Bruce.

For the above reasons, this Court declines to grant Flint's motion to set aside default.

AND IT IS SO ORDERED.



The Hon. Edward W. Miller
Judge, Thirteenth Judicial Circuit

Greenville, South Carolina

Date: 7/23/13

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO: 2011CP2307943

FILED CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENHUISER
2013 JUL 26 P 12:53

John Deere Financial Fsb vs. Jerry A Bruce

CHECK ONE:

- ☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other: _____
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j) SCRPC; ☐ Bankruptcy: ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____
- ☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order; ☐ Statement of Judgment by the Court:

NOTICE

This is a notice to you that an Order Denying Flint Equipment Co.'s Dual Motion To Set Aside Default Judgment And Declare Default Judgment Void in this case has been filed in the Clerk of Court's Office. To obtain a certified copy, you may contact our office by phone (864) 467-8551 or email a request to bk Lukas@greenvillecounty.org. If you would like a copy via email, please provide a valid email address.

Dated at Greenville, South Carolina, this.

Court Reporter: _____

PRESIDING JUDGE -

Craig Horger Allen Craig H. Allen, P.A. P.O. Box
10854 Greenville, SC 29603

Oscar W. Bannister Bannister & Wyatt, LLC P.O.
Box 10007 Greenville, SC 29603
William Joseph Moore Jr. Gertz & Moore, LLP
P.O. Box 456 Columbia, SC 29202

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Paul B. Wickensimer Greenville County Clerk Of Court
- Clerk of Court

ENTERED COMPUTER

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

John Deere Financial, f.s.b., f/k/a
FPC Financial, f.s.b.,

Plaintiff,

vs.

Jerry A. Bruce,

Defendant,

AND

Jerry A. Bruce,

Third-Party Plaintiff,

vs.

Flint Equipment Co.,

Third-Party Defendant.

IN THE COURT OF COMMON PLEAS

THIRTEENTH JUDICIAL CIRCUIT

CASE NUMBER: 2011-CP-23-7943

ORDER

2013 JUL 25 PM 12:54

CLERK OF COURT
JOHN DEERE FINANCIAL CO., INC.
PO BOX 80000
GREENVILLE, SC 29608

WLB

The above entitled matter came before the Court on July 10, 2013 on the dual motion of Flint Equipment Co. ("Flint") to (1) set aside a default judgment under Rule 55(c) and Rule 60(b)(1), S.C.R.C.P. and (2) declare the default judgment void pursuant to Rule 60(b)(4) and Rule 14(a), S.C.R.C.P.

After reviewing the records in this case, the affidavits and briefs submitted to the Court and hearing the arguments of counsel, the Court makes the following findings of fact and conclusions of law:

1. This Court has jurisdiction over the parties and the subject matter of this action.
2. The motion to set aside default judgment is denied.

This action began with the filing of a Complaint by John Deere Financial, f.s.b., FPC Financial, f.s.b. ("John Deere") on or about November 29, 2011. The essence of the Complaint

1
[Signature]

was that John Deere had honored the charge by Jerry Bruce ("Bruce") on a credit line for a certain amount. Pursuant to Bruce's agreement with John Deere, John Deere was entitled to recover the amount plus attorney fees.

Bruce timely filed an Answer and on December 6, 2012 Bruce moved to add Flint as a third party defendant pursuant to Rule 14(a), S.C.R.C.P. This matter was heard before the Honorable Leticia H. Verdin on February 5, 2013 and Judge Verdin orally ruled from the bench that Bruce could amend his pleadings and file a third party complaint against Flint.

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Initially Flint sought to have its motion for default determined by the less strict legal standard of Rule 55(c). Part of its argument for the lesser standard was that the Order of Judge Hill was not an order of default. This interpretation of Judge Hill's Order is misplaced. This

Court finds Judge Hill's Order was for default and therefore the more stringent requirements of Rule (60)(b)(1) must be applied.

The Court finds that Flint has not presented excusable neglect and therefore, good cause for setting aside the default. Flint acknowledges that it is aware of the serious^{NATURE} of lawsuits and pleadings in general. Flint further acknowledges that it has set up a system for reviewing legal pleadings. Flint further acknowledges that it has no knowledge of what happened to the Bruce Third Party Complaint once it was delivered to Flint's home office. As stated by Flint's attorney in open court, the pleading simply disappeared and had not been found. *Em*

It appears to the Court that the pleadings were properly delivered to the home office where personnel were trained to be aware of the seriousness of pleadings and those pleadings were simply lost or misdirected. Therefore, in the exercise of my discretion, I decline to relieve Flint of the default. Sundown v. Intedged Ind., 383 S.C. 601, 681 S.E.2d 885 (2009).

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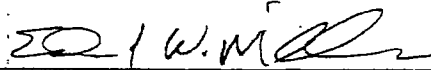
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Even if Flint's Rule 14 motion is proper, the Court declines to set aside the default under

the exercise of its discretion. Bruce's claim that Flint charged his credit line for work he did not authorize is admitted by Flint's default and is certainly intertwined with John Deere's claim against Bruce.

For the above reasons, this Court declines to grant Flint's motion to set aside default.

AND IT IS SO ORDERED.



The Hon. Edward W. Miller
Judge, Thirteenth Judicial Circuit

Greenville, South Carolina

Date: 7/23/13

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO: 2011CP2307943

FILED CLERK OF COURT
GREENVILLE CO. S.C.
PAUL R. WILKINSON
2013 JUL 26 P 12:57

John Deere Financial Fsb vs. Jerry A Bruce

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Dated at Greenville, South Carolina, this .

Court Reporter:

PRESIDING JUDGE -

Craig Horger Allen Craig H. Allen, P.A. P.O. Box
10854 Greenville, SC 29603

ATTORNEY(S) FOR THE PLAINTIFF(S)

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William Joseph Moore Jr. Gertz & Moore, LLP
P.O. Box 456 Columbia, SC 29202

ATTORNEY(S) FOR THE DEFENDANT(S)

Paul B. Wickensimer Greenville County Clerk Of Court
- Clerk of Court

CERTIFICATE OF APPELLANT

The undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

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Dated: November 12, 2014

RECEIVED

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SC Court of Appeals